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**Freedom of Information and Records Management:
A Learning Curve for Botswana**

Peter Mazebe II Mothataesi Sebina

**Thesis submitted to the University of London for the degree
of Doctor of Philosophy**

**School of Library, Archive and Information Studies
University College London**

2006

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Declaration

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Abstract

Freedom of Information (FOI) legislation is mostly adopted on the presumption that good records management exists. However, it is pertinent that the functionality of records management in the creation, management and making records available for access internally within government and externally to citizens be established as the legislation is being planned for. Through the planning process, the capacities of records management in providing access to information will be known. This study employs a Grounded Theory based methodology on data collected from Botswana, Ireland, Malawi, South Africa and the UK to discern Botswana's preparedness for FOI legislation in line with the country's national aspiration, *Vision 2016*. It also uses the same data to unearth relationships that exist between records management and FOI legislation.

The study has established that constitutional guarantees on access to information are an inadequate measure to enable citizens to gain direct access to official information. As a result, countries which regulate access to information through the guarantees have to adopt FOI legislation so as to effectuate them. The adoption of the legislation should be founded on the democratic ideal of enhancing the capacity of citizens in developing and offering informed consent including improving their participation in their governance. The law should also be predicated on the obligation of government in accounting to citizens as well as empowering them to hold it to account. In addition, the law should be based on an environment which would enable citizens to formulate, develop and demonstrate trust in the governance process. Lastly FOI legislation should be built on a good records management system which will provide an assurance that the governance process is well documented, and its records can be availed for access.

Through the diverse case study countries, the study has established that Botswana is prepared for the adoption of FOI legislation. However, as the country works towards adoption of the legislation, it should strive to evaluate the efficacy of public sector records management.

Acknowledgements

Researching into and writing up this thesis would not have progressed the way it did without the encouragement and guidance of my supervisors, Dr. Elizabeth Shepherd and Mr. Geoffrey Yeo. The comments they made on this work were constructive throughout the period of my study and they have encouraged me in every aspect of the work.

I wish to also pay particular respects to the University of Botswana who granted me study leave as well as funded my studies; the School of Library, Archive and Information Studies (SLAIS) and the Graduate School of UCL in funding my initial fieldwork; and the International Records Management Trust for the support they have provided during the period of my study.

I wish to express my sincere thanks to my family nucleus and extended for encouraging me to go on through the years of this study. I single out: Dr. Jaone Jayson Sebina for running my affairs back home diligently during my absence, and all the support he has made available to me; Gaone Moagi and Mildred Gerieta Sorinyane for housing me when I needed accommodation. I thank also my colleagues notably, Justus Wamukoya, Shadrack Katuu, Segomotso Keakopa, Lekoko Kenosi, Isaac Mogotsi, Elizabeth Motswapong, Lesego Gabaitiri, Nathan Mnjama and David Luyombya for the support and discussions which kept me going. I am also indebted to Kago Ramokate, Pena Monageng, Shirley Masete, Didimalang Motshaba, Angela Mazhani, Topo Thebe, Kenaope Pule, Thembisa Maphane, John Hulela, Tlhabologo Piet, Leteng Sebusang, Thomas Rantsomakane, Dolly Basele and Kenole, and many more that I have not mentioned by name.

My sincere appreciation are also due to Susan Williams and Gervase Hood for their valuable friendship; Rick Snell for making himself available to read through my drafts and to discuss pertinent issues with me; Professor John McIlwaine for valuable comments on bibliographical formulations, and my respondents for their time and input into this work.

It would be huge omission on my part to forget to thank Tebogo for single-handedly raising Nkagisang-Boago during my absence. I also thank my grandmother for her prayers and Almighty God for His spiritual guidance and encouragement.

Dedication

This thesis is dedicated to the following souls who have since moved on:

My uncle Moruti, Dolvin Shanto Moagi; my aunties Maria Ntheipi Modimakwane; Gaokgang V. Sebina; my cousin-brother Refilwe Shimo Moagi; and my friend Kerileng Tshetlha Lere.

Your memories will live with us forever and I shall forever cherish and love you all.

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List of Abbreviations

ARMA	Association of Records Managers and Administrators (USA)
AU	African Union
AUS	Australia
BNARS	Botswana National Archives and Records Services
BOCONGO	Botswana Council of Non-Governmental Organisations
BW	Botswana
CAIRS	Co-ordination of Access to Information Request System
CAN	Canada
CHRI	Commonwealth Human Rights Initiative
CPA	Centre for Policy Alternatives (Sri lanka)
ECHR	European Convention on Human Rights
EU	European Union
FOI	Freedom of Information
HRCP	Human Rights Commission of Pakistan
ICCPR	International Covenant on Civil and People's Rights
ICT	Information Communication Technologies
IMF	International Monetary Fund
IRE	Ireland
IRMT	International Records Management Trust
ISO	International Standards Organisation
MAL	Malawi
MISA	Media Institute of Southern Africa
n.d.	No date
OECD	Organisation for Economic Cooperation and Development

SA	South Africa
SADC	Southern African Development Community
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
USA	United States of America

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Chapter 1: Background to the study

1.1 Introduction

Freedom of information (FOI) has acquired increasing societal importance in recent years: records management is a longer established discipline but its public profile is low. This study seeks to situate FOI in Botswana. In order to do this effectively, the study also seeks to uncover the relationships that exist between records management and FOI legislation. In examining FOI and in revealing these relationships, the study draws on comparative experiences gained from Botswana, Malawi, South Africa, the Republic of Ireland and the United Kingdom (UK). At the centre of the comparisons is Botswana, a country which as at 2006 has not adopted FOI legislation and indications are that this is far from imminent.¹ The comparisons will help the author to appraise Botswana's current approach to the provision of access to information and thereby determine whether the country needs FOI legislation or whether it can make do with the procedures it has. The comparisons will also enable a better understanding of whether the country's current approach to the management of public sector records is sufficient in aiding access to information or is in need of reform.

FOI literature generally assumes that records management exists and works to facilitate access to information. The literature rarely touches on the efficacy of FOI legislation where records management is weak and failing to maintain accountability in a polity. However, some of the literature assumes that FOI legislation has the necessary re-engineering capacities to make records management work. Undoubtedly, a belief arises from this literature, and from the shared experience of professionals in the field, that records management is essential for effective FOI legislation. Another viewpoint suggests that FOI legislation can lead to improvements in records management. Underlying both is the notion that records management and FOI legislation may share some relationships which make one important to the other. FOI legislation is important to both citizens and government irrespective of the state of

¹ Botswana Government The Presidential Task Group *Long term vision for Botswana: towards prosperity for all: Vision 2016* (Gaborone: Government Printer, 1997): 34 and 69.

records management, and records management is also important whether or not FOI legislation has been promulgated. However, any effective FOI scheme will benefit tremendously from good records management, and FOI is likely to show up weaknesses in the management of records.

1.2 Records management and freedom of information: a preface

1.2.1 Importance of records

All organisations, public or private, rely on records in their daily operations. Records are the corporate memory of organisations in that they support daily business undertakings, facilitate decision making and policy formulation, and are in themselves a part of an organisation's endeavour to carry out its business.² Records provide information and evidence of the functions carried out and are thus critical to protecting organisations and their interests during litigation and other legal challenges; enabling them to conform with accountability requirements, and comply with the prescriptions of all government statutes including access to information.³ Roberts of the State Records Authority in New South Wales in Australia identified three domains in which records are essential.⁴ These domains are:

- The business domain: organisations create and maintain records to support their daily business needs and expectations. Planning the direction which a certain business process has to follow relies on records, and executing these plans results in the creation of more records and further reliance on those already in existence; recruiting and retaining employees to facilitate expected business processes requires the creation and maintenance of records. In fact, almost everything that an organisation does relies on the availability and utility of records.

² E Shepherd and G Yeo *Managing records – a handbook of principles and practice* (London: Facet Publishing, 2003): xi.

³ J Kennedy and C Schauder *Records management: a guide to corporate record keeping* 2nd edn. (South Melbourne: Longman, 1998): 46.

⁴ D Roberts *Documenting the future: policy and strategies for electronic recordkeeping in the New South Wales public sector* (Sydney, N.S.W: Archives Authority of New South Wales, 1995). Available at <<http://www.records.nsw.gov.au/publicsector/erk/df/tofcont.htm>>. Accessed 18/08/06.

- The accountability domain: accountability within and outside organisations relies on the exchange of information from someone who has to account to the one holding the account. Records capture information, some of which is indispensable to accountability. Accountability therefore, depends on there being information and evidence relating to the account that is being made. In this respect, organisations keep records so that they may produce informed accounts of their business processes. In the event that an account is queried, records can be accessed to clarify whatever is being questioned.
- The cultural domain: although records are created to support and document business processes, some have values other than those for which they were created. These records, particularly those archival in nature, have historical and cultural nuances which make them valuable to the society to which they relate.

Records management, therefore, is indispensable to the daily administration of organisations. To undertake any of their mandates, organisations generate records and utilise those already in existence. Managing these records is vital to ensure their availability when needed to inform or act as evidence of business processes. Since records document what organisations do, they are an essential part of the entire accountability process. In carrying out their mandates, organisations develop relationships with society, and records which capture these relationships may warrant permanent retention as part of the documented history of society.

1.2.2 Defining records

Textbook definitions of records are not in complete agreement on the nature of records. Traditional definitions of records suggest they are tied to some physical format or storage medium. For instance, Schellenberg defined records as:

All books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any public or private institution in pursuance of its legal obligations or in connection with the transaction of its proper business and preserved or appropriate for preservation by that institution or its legitimate successor as evidence of its functions,

policies, decisions, procedures, operations, or other activities or because of the informational value of the data contained therein.⁵

This definition ascribed records to their physical form. That is, records have to have some storage medium, as in 'books, paper, maps, [and] photographs.' This definition is traditional in that it appeals our senses to things we are accustomed to i.e. letters, reports, invoices, and so on, all in paper format, things that we are used to handling almost daily. Definitions from some more recent American records management textbooks⁶ defined records much along the lines of the Association of Records Managers and Administrators (ARMA) who viewed them as "recorded information, regardless of medium or characteristics, made or received by an organization that is useful in the operation of the organization."⁷ What is important to these American definitions is that *records* are *recorded information* irrespective of the format. Shepherd and Yeo observed that a *record* is not simply *recorded information* but it more importantly possesses characteristics that provide evidence of some activity.⁸

A recent definition in ISO 15489, the international standard for records management, viewed records as "information created, received and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business."⁹ This definition emphasised that *records* are primarily *information* (which is created and maintained by an organisation); the *information* is (maintained as) *evidence* (of business transactions). The form or medium in which the record is does not matter. What is essential is its content and purpose, (the *information* supporting a business process and the *evidence* of the transactions that generated the information).¹⁰

⁵ T R Schellenberg *Modern archives, principles and techniques* (Melbourne: F.W. Cheshire, 1956): 16.

⁶ N F Kallaus and M M Johnson *Records management* 5th edn. (Cincinnati, OH: South-West Publishing Company, 1992): 3.

⁷ Association of Records Managers and Administrators *Glossary of records management terms* (Prairie Village, KS: ARMA International, 1989): 16.

⁸ E Shepherd and G Yeo *Managing records*: 2; see also chapter 1 of R J Cox *Managing records as evidence and information* (London: Quorum, 2001); T Livelton *Archival theory, records and the public* (London: Scarecrow Press, 1996): 59 and a response to T Livelton's work by T Nesmith 'Still fuzzy, but more accurate: some thoughts on the 'ghosts' of archival theory' *Archivaria* 47 (1999): 136-150.

⁹ International Standards Organisation *ISO 15489-1:2001 Information and documentation-records management. Part 1, General* (London: British Standards Institution, 2001):3.

¹⁰ D Roberts *Documenting the future*.

Records have been found to possess certain attributes that distinguish them from other types of information. These can be summarised as content, context and structure:¹¹

- **Content:** This refers to the subject matter or that which makes up the substance of a record. Content captures all the information reflective of the business process that led to its creation; it accurately records what was done or is being done, and the information it captures is a comprehensive account of the processes followed (i.e. evidence). Content can be made up of data, text, numbers etc that make up the subject matter resulting from a business transaction. One important aspect is a record's ability to fix the content, ensuring that it is consistent as long as the record is needed.
- **Context:** A record's context depicts the circumstances surrounding its creation and use. Context establishes the reasons culminating in the creation of the records, the business processes the records are derived from and seeks to explain who the participants in their creation are, including all salient issues that ultimately give records meaning. Context also establishes the interrelationships among records. At times, the meaning expected of a record can only be derived and understood after these relationships have been understood.
- **Structure:** The structure of records can mean their internal layout. Structure of records extends beyond just the relationships within a record to its relationship with other records in a folder or file, to records in the same series or resulting from the same business activity. Structure is an important aspect which enables the understanding of the content of a record. A record's structure reflects the arrangement of the content and is an elucidation of its context and enables the meaning of a record to be known and understood.

These essential attributes intrinsically inspire trust in records which are then deemed as authentic, reliable, integral and usable.

¹¹ E Shepherd and G Yeo *Managing records*: 10-11.

1.2.3 Defining archives

The term 'archives' has been used in literature at times as a synonym with 'records.' The reason for the usage seems to emanate from the derivation of archives from the records organisations have created and held. Williams declared that archivists and records managers take records to "comprise information generated by organisations and individuals in their daily business and personal transactions."¹² However, as argued in section 1.2.2, records do much more than just capture information. They are, on top of capturing and providing information, evidence of the transactions which have generated them.

The term 'archives' has been associated with old documentation. Some individuals and organisations usually refer to their storage areas where they keep old documentation as their 'archives' and the documents in them will also be known as 'archives.' Shepherd and Yeo qualified that 'archives:'

may include records that have continuing significance in the conduct of business, for example as evidence of the organization's constitution or its ongoing rights and obligations. They may also include records that are no longer expected to be required for the operational use or to support accountability, but are kept indefinitely as part of the corporate memory of the organization or for research or other cultural purposes.¹³

Hence, archives are records or as Williams suggested, are a division of records.¹⁴ Archives just like records, possess a content, have a context and a structure. Just like records, archives are expected to be authentic, reliable, integral and usable. In light of this, archives are records which in the process of their accumulation and use, have accrued added importance not just to the activities to which they are related to or have supported, but are found to explain the history of an organisation or a people. As a result of this added value, archives are selected from other bodies of records and preserved indefinitely. Due to the similarities which records and archives share, the term 'records' will be used in this thesis to stand also for 'archives.'

¹² C Williams *Managing archives: foundations, principles and practice* (Oxford: Chandos Publishing, 2006): 4.

¹³ E Shepherd and G Yeo *Managing records*: 5.

¹⁴ C Williams *Managing archives*: 4.

1.2.4 Defining records management

Organisational records are managed through a process known as records management. Records management is defined in ISO 15489 as “a field of management responsible for the efficient and systematic control of the creation, receipt, maintenance, use and disposition of records...”¹⁵ ISO 15489 noted that management of records includes but is not limited to:¹⁶

- setting policies guiding records creation and their management as well as standards mapping processes that are to be applied in records creation, maintenance, use and disposition;
- assigning records management responsibilities among staff of an organisation;
- putting into place records management procedures that would ensure uniformity of processes;
- choosing and oversight of records management systems;
- ensuring that records management is integrated into each business process of organisations.

To assist in the effective creation and general management of records, organisations should institute a records management programme composed of among others:¹⁷

- a system that evaluates the business processes an organisation carries out and determines the information resulting from each process and ascertaining which of it has to be captured as records;
- making decisions on the form of records to be created and the appropriate technologies needed to support and enhance their creation;
- evaluating metadata needed as part of the record and establishing how the metadata will continue to be linked to the record as long as it is needed for the business process that led to its creation;

¹⁵ International Standards Organisation *ISO 15489-1: 2001*: 3.

¹⁶ International Standards Organisation *ISO 15489-1: 2001*: 4.

¹⁷ International Standards Organisation *ISO 15489-1: 2001*: 6.

- designing retrieval mechanisms for records and ensuring that the records can be shared by business processes without getting lost, being altered or damaged;
- assessing risks associated with failure to create and maintain appropriate records or failure to retrieve them when they are needed;
- deciding how records will be preserved over time to enable their availability any time they are needed for conduct of business;
- ensuring records are retained for appropriate periods that tally with business processes;
- seeing to the safe and secure maintenance of records;
- establishing methodologies for evaluating and monitoring the effectiveness of systems instituted for managing records.

1.2.5 Defining information

Information which records capture is an organisational asset and a resource which helps organisations to meet their goals and objectives, and it is also evidence of how their functions are being executed. On its own information cannot provide evidence of a business transaction. It can only do so once it is recorded and contains all the record attributes and qualities discussed earlier. Information thus is a broad concept and includes records as one of its subtypes.

Keenan and Johnston defined 'information' as:

Something learned, facts that are gathered or a measure of the content of a message...It can be a sensible statement, opinion, fact, concept or idea or an association of statements, opinions, or ideas. It is closely associated with knowledge in that once information has been assimilated, correlated and understood it becomes knowledge.¹⁸

Information is also understood to be data or knowledge. The data becomes knowledge only once some meaning has been attached to it.¹⁹ Information is further seen as a

¹⁸ S Keenan and C Johnston *Concise dictionary of library and information science* 2nd edn. (London: Bowker-Saur, 2000):133.

¹⁹ I A Penn, G B Pennix and J Coulson *Records management handbook* 2nd edn. (Brookfield, VT: Gower, 1994):3.

“category of concepts which our minds take in, consciously register, to which meaning can be attributed and which normally modify our state of knowledge.”²⁰ Information is also something that is communicated between persons and it has to be meaningful for people to make use of it.²¹ These definitions do not tie information down to any physical medium. This means that information is not just a domain for physical objects like paper but can also be captured in virtual elements such as electronic records, which might lack a physical medium. If information can be captured on many different media this brings it in line with the ISO 15489 definition of records, where information can form the content of a record but the record only becomes complete after it gains a context and a structure.

Information can either be published or unpublished. Published information is normally in the form of books, journals, CD-ROMs and so on. In its nature published information does provide *information* but not *evidence*. In other words, published information lacks the evidentiary elements with which records are associated. This is because the information will be deficient in the specific attributes and qualities that give records their status. Unpublished (proprietary) information can be used to support a business activity but in itself is not a record of the business activity. Such information may be created to be incorporated into records. Once it has been incorporated and forms part of a record, only then does it provide evidence of a transaction and information on how it was carried out. If the evidentiary element is missing, the information does not become a record but simply remains information.²²

Information is a resource which organisations create and rely on. It acquires additional values as an asset when it is captured in records to complement the evidence which they document. In this state, information is managed as part of a record (its content). Access to information in organisations can either be to records or to any other information source which may be published or unpublished. Access is not restricted just to internal organisational uses, since citizens individually or as groups can gain access to it to inform themselves on the processes that have generated it, and to use it to hold organisations accountable.

²⁰ M W Hill *The impact of information on society: an examination of its nature, value and usage* (East Grinstead: Bowker-Saur, 1998): 22.

²¹ W J Martin *The global information society* (Aldershot: Aslib Gower, 1995):22.

²² D Roberts *Documenting the future*.

1.2.6 Freedom of Information

The need for the public to have a legal right of access to information which is held by government has been proclaimed under statutes of different names in different countries. Some refer to it as *Freedom of Information* others as *Access to Information* and some as the *Promotion of Access to Information*.²³ Despite the differences in titling, the underlying conception and purpose remain the same. In each case, statutes enforce and regulate legal rights enabling members of the public to gain access to information held by government. For the purposes of this study the term *freedom of information* is used.

FOI legislation is an initiative towards making government more open. It is not an end in itself but together with other open government initiatives it aims at making governments more accountable and transparent in their dealings with the public. FOI laws can be traced back to Sweden and Finland where they have been in existence since the 18th century. The United States of America enacted its law in 1966 and Denmark and Norway enacted similar laws in 1970. Eight years later France and the Netherlands enacted FOI, while Canada, New Zealand and Australia adopted theirs in 1982. The 1990s witnessed a surge in the number of countries adopting FOI including the Republic of Ireland in 1997. The new millennium promises to usher many more FOI laws. Already countries like the UK and South Africa (2000) and many others have legislated FOI.²⁴

FOI legislation enforces and implements a legal right which enables members of the public to acquire and gain direct access to government information. The premise for the legislation emanates from the democratic conviction which sees government as an agent of the people and conversely being responsible towards them. This conviction states that government gathers and uses information resulting from

²³ T Riley 'Freedom of information and the right to know: accessing government documents' in D Routledge, K Barata and P Cain (eds.) *Information for accountability workshops, sourcebook* (London: IRMT, 2000):29; T Riley 'What is this thing called FOI?' in T Riley and H C Relyea (eds.) *Freedom of information trends in the information age* (London: Frank Cass, 1983): 1.

²⁴ See generally, T Mendel *Freedom of information: a comparative legal survey* (New Delhi: UNESCO, 2003). Available at http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_1aws.pdf. Accessed 18/08/06 and D Banisar *Freedom of information and access to government record laws around the world* (Washington, DC: freedominfo.org, 2004). Available at http://www.freedominfo.org/documents/global_survey2004.pdf. Accessed 18/08/06.

the agency relationship it has with the public. Therefore, access to information is not for the benefit of government alone but for the public also. This view sees government-held information as belonging to the public and government as the custodian of it. Essentially, government is the custodian of all public assets and resources inclusive but not limited to government buildings, furniture in government offices, and public servants themselves.²⁵ If the public have the right of access to government offices to obtain assistance from public servants why should they not have the right to access government information? This is one of the questions which FOI legislation seeks to address.

FOI legislation is also a democratic attempt to ensure that the public remains sovereign through the opening up of government machinery and activities to public scrutiny by virtue of access to official information. The presumption here is that democratic government is in power because of the public who elected it and as a result the people are sovereign, since those in government are in those positions because they were selected to represent the many.²⁶ Government, therefore, is the agent and the people, the principal. The public have selected the agent to govern on their behalf but authority rests with the principal to retain the representation or even to question its efficiency and efficacy.

The legal right to access official information which FOI legislation enforces, is intended to enable members of the public to understand public policy debates better and to be more informed about their relevance and direction when participating in them, and to be in a position to consent to them or validate government's activities.²⁷ Through becoming a right, access to information enables members of the public to act

²⁵ J Stiglitz 'Transparency in government' in *The right to tell-the role of the mass media in economic development* (Washington, DC: The World Bank, 2002):28-29; 39-40.

²⁶ D V Smiley *The freedom of information issue: a political analysis* (Toronto: Commission on Freedom of Information and Individual Privacy, 1978): 30; The Campaign for Freedom of Information *Freedom of information checklist* (London: The Campaign for Freedom of Information, n.d.): 1. Available at <<http://www.cfoi.org.uk/pdf/checklist.pdf>>. Accessed 21/08/06.

²⁷ Personal interview with UK/9, 07/04/04.

as external experts who can evaluate the effect which government information meant for decision-making is likely to create.²⁸ Maurice Frankel, the Director of the Campaign for Freedom of Information, in the UK, argued that FOI is a “right which the individual exercises directly, without an intermediary. People seeking information do not have to persuade an elected representative to ask questions for them, search for a lawyer willing to waive his fees or hope that their situation involves the peculiar characteristics that the press deem newsworthy. It is a free-standing right, which the ordinary citizen uses in his or her own name.”²⁹

FOI is a right which any member of the public can enjoy without necessarily relying on the intervention of other people or institutions for it to take effect. It is not a right reserved for a certain race or creed but it is one which any person has at their disposal. It is also a right which members of the public can enjoy without the need to justify why they need access to a particular body of information.

It must, however, be noted that FOI legislation does not exclusively serve individual curiosities of wanting to know what government is doing and how it does. It creates an environment where members of the public can individually or collectively hold government to account through the privilege of access to official information.³⁰

Although providing a legal right to access government information, FOI legislation does not suggest that the public can access the entire body of official information. It is a law which acknowledges that government, like any other individual, has the right to retain and keep certain information secret and away from public scrutiny. FOI legislation therefore, strikes a balance between the public’s right to know and the right of government to withhold certain information. However, FOI

²⁸ H MacNeil *Without consent: the ethics of disclosing personal information in the public archives*. (Metuchen, NJ: Scarecrow Press, 1992):62; P Birkinshaw *Freedom of information: the law, the practice and the ideal* 3rd edn. (London: Butterworths, 2001):28; The Campaign for Freedom of Information *Freedom of information checklist*: 1.

²⁹ M Frankel *Freedom of Information and corruption: paper for the global forum on fighting corruption and safeguarding integrity* (London: The Campaign for Freedom of Information Ltd., 2001): 1. Available at <<http://www.cfoi.org.uk/pdf/corruptionmf.pdf>>. Accessed 21/08/06; same expressions were made during the author’s personal interview with UK/16, 09/12/04.

³⁰ D V Smiley *The freedom of information issue*:30; H Mitchell *Access to information and policy making: a comparative study* (Toronto: Commission on Freedom of Information and Individual Privacy, 1980):1-2.

legislation does not make it automatic for governments to withhold certain information and declare it inaccessible. It obliges governments to state reasons for non-disclosures as against the disclosure of other information.³¹

In enforcing the right of access to official information, FOI legislation obliges governments to facilitate access upon receiving a request for it and also obliges them to proactively publish and disseminate information for public consumption without waiting for the public to seek for it.³² FOI legislation therefore establishes three types of rights for citizens, namely:

- A right for any individual who has made a request to access information to be told whether the information exists and is held by the respective agency;
- A right to be given access to the information requested within the period prescribed by the law, for instance 20 working days according to the UK FOI law;
- A right to be told that the information requested for access exists but cannot be made available because a specific exemption applies.

Through establishing the above rights FOI legislation obliges agencies to be abreast with six things:³³

1. What is the information they hold?
2. Where is it held?
3. Who holds the information?
4. How accessible is the information?
5. How can it be accessed?
6. Is the information reliable in relation to the transactions that gave rise to it?

³¹ K Kernaghan *Freedom of information and ministerial responsibility* (Toronto: Commission on Freedom of Information and Individual Privacy, 1978):1; T B Riley 'Freedom of Information:'57

³² Article 19, CHRI, CPA and HRCF *Global trends on the right to information: a survey of South Asia* (London: Article 19, 2001). Available at <<http://www.article19.org/pdfs/publications/south-asia-foi-survey.pdf#search=%22Global%20trends%20on%20the%20right%20to%20information%3A%20a%20survey%20of%20South%20Asia%22>>. Accessed 21/08/06.

³³ L Screene 'How prepared are public bodies for the implementation of the UK Freedom of Information Act, in January 2005?' unpublished MA dissertation, University College London, 2004: 6.

In light of this, a UK respondent has highlighted that organisations by virtue of FOI legislation “have to know what they have...that is a very practical thing because if they have got a request for information, they have to know where they have to start looking.”³⁴ An Irish respondent added “accessibility goes hand in hand with knowing the information you hold. If it does not exist or is not held or where it is held is unknown, then it cannot be accessible. That is why organisations must have a system of managing information to support the need to make it accessible.”³⁵

What this obligation suggests, according to an Irish respondent is, that:

agencies have to keep records and to keep quality records that demonstrate the decision making process. On the downside, FOI also obliges them to create records-some of these records will be relied on to provide the information following a request for it. Thus, FOI forces administrators to be accountable with records once they have been created. They need to know: the records they create and hold; how long to retain them; where to retain them; how to retain them; how to make them accessible, and what to do with them once retention periods are met.³⁶

Generally, FOI legislation mandates governments to create and maintain records and information in a manner permitting for their proactive disclosure and for satisfying individual requests for access to information.

Through the promulgation of FOI legislation, governments attempt to:³⁷

- Acknowledge that official information belongs to the public;
- Set out the content and parameters of the right to access official information;
- Create duty-holders who are responsible for the provision of official information;
- Create beneficiaries who are legally empowered to seek and harness official information;
- Stipulate government bodies from which members of the public can gain access to information and the ones exempted;
- Explain how, when and at what cost information can be accessed;

³⁴ Personal interview with UK/4, 30/01/04.

³⁵ Personal interview with IRE/2, 14/12/04.

³⁶ Personal interview with IRE/1, 14/12/04.

³⁷ C Rodrigues *The right to information: the key to deepening democracy and development*. Available at http://www.humanrightsinitiative.org/programs/ai/rti/articles/rti_key_deepening_democracy_development.pdf. Accessed 21/08/06.

- Make clear the duties of government bodies covered by the legislation in providing members of the public with information;
- Set out prescriptions governing how government bodies may legitimately refuse to provide the public with access to official information;
- Lay down procedures regulating how access to information will be provided without waiting for requests for its access to be made;
- Explain how conflicting access issues will be resolved.

In essence, FOI legislation states that access to government-held information by members of the public is a right not a favour or privilege. It also ensures that government is not given the sole discretion to determine which information to release into public domain, when to do so and how to do so but assumes all government information is open except for certain exemptions.

The purpose of FOI legislation is to enable members of the public to gain access to government information. Even so, some governments are known to have raised access fees, thereby making it difficult for members of the public to exercise this right.³⁸ When this happens, access rights become deficient in that higher access fees reduce the number of requests made, thereby limiting potential access to those citizens who will be able to raise the required funds. The purpose of FOI legislation is achieved only when members of the public can use the legislation and government undertakes its expected obligations to proactively release information, and to process requests for access to information within the prescribed periods.

Some FOI laws, apart from enforcing access to government-held information, have extended their coverage to private institutions. The South African FOI law is one whose scope includes also the private sector. Commentators on FOI often accuse governments of privatising some of their functions as way of placing them outside coverage of the FOI laws.³⁹ It appears that the law in South Africa addresses this because of its wide coverage.

³⁸ The Republic of Ireland in 2003 is among other countries which have revised its access to information fee leading to the Information Commissioner carrying out an investigation to determine the likely impacts. Reductions in requests made for access to information is likely. See generally, Ireland Government, Office of the Information Commissioner *Review of the operations of the Freedom of Information (Amendment) Act 2003* (Dublin: Office of the Information Commissioner, 2004).

³⁹ G Gallop 'Drawing the line between the public and the private:' 3. The Reid Oration, Institute of Public Administration, Australia, 7 December 1999. Available at <<http://www.premier.wa.gov.au/docs/speeches/TheReidOrati.pdf>>. Accessed 21/08/06.

Other FOI laws also protect personal privacy. These laws enable members of the public to gain access to information about them kept by government and can have the information amended if there is justification to do so. The laws also protect personal information against third-party access unless extenuating circumstances demand that access is allowed. Some other countries, such as the Republic of Ireland and the UK, have separate laws for FOI and privacy (also known as data protection). The Northern Territory in Australia has enacted an Information law which enforces FOI, privacy and management of archives and records all in a single piece of legislation.⁴⁰

Where they exist, FOI laws in the countries selected for this study legally enforce a right to access records⁴¹ or recorded information.⁴² In their titling, most of the FOI laws have as their focus 'information' despite differences in whether the rights are for access to records or information.⁴³ Thus, FOI laws having as their focus 'records' suggest that access is legally enforced for recorded information. Those whose concentration is on 'information' intimate that 'information' can also be recorded, meaning that access is provided for information which is recorded. However, section 84 of the UK FOI law which has access to 'information' as its focus, defines the term to mean 'information which is recorded irrespective of form.'⁴⁴ FOI laws generally have access to 'information which is recorded' as their central concern.⁴⁵

Consequently, the legal access which FOI laws enforce is in tandem with the ISO 15489 definition of records presented earlier, which states that records provide information and evidence of a business process without tying the information to any

⁴⁰ See Northern Territory Government, *Australia Information Act*. Available at <http://www.austlii.edu.au/au/legis/nt/consol_act/ia144/>. Accessed 21/08/06.

⁴¹ South Africa Government *Promotion of Access to Information Act* (Cape Town: 2000): Part 1, Chapter 2, Section 3. Available at <<http://www.info.gov.za/gazette/acts/2000/a2-00.pdf>>. Accessed 21/08/06; Ireland Government *Freedom of Information Act* (Dublin: 1997): Section 6 (1). Available at <<http://www.irishstatutebook.ie/ZZA13Y1997.html>>. Accessed 21/08/06.

⁴² United Kingdom Government *UK Freedom of Information Act* (London: Her Majesty's Stationery Office, 2000): Section 1. Available at <<http://www.opsi.gov.uk/acts/acts2000/20000036.htm>>. Accessed 21/08/06.

⁴³ For example Access to Information (Canada), Freedom of Information (UK), Promotion of Access to Information (South Africa).

⁴⁴ United Kingdom Government *UK Freedom of Information Act*.

⁴⁵ P Coppel 'The right to information' in P Coppel (ed.) *Information rights* (London: Sweet and Maxwell, 2004): 255-262.

physical form. Considering that access is a preserve for information which is recorded irrespective of the recording medium, FOI laws cater for both records (composed of a content, context and structure) and for other sources which have recorded the information but are not records in the strictest sense. The focal point of FOI legislation in organisations is the manner in which information is created, retained and disposed of in the normal course of business, thus appealing to the need to ensure that appropriate records and information are created and well maintained. This calls into service records management which will ensure that records and information are available to process requests for access and for proactive release of information into the public domain.

1.3 Botswana: an historiography

Botswana, known until 1966 as the Bechuanaland Protectorate, is a landlocked country in Southern Africa (See figure 1) encompassing 582000 square kilometres. It gained independence from the UK on 30 September 1966 after 81 years of being a British protectorate.

Figure 1: Map of Botswana



Source: <<http://www.atlas.gov.bw/>>. Accessed 06/04/05.

Under British rule, Bechuanaland Protectorate was administered from Mafikeng in what is now the North West Province of South Africa. This meant that the administration of the Protectorate was conducted from outside the borders of the country. In 1890 an Order-in-Council gave the High Commissioner powers to issue laws in the form of proclamations in the Protectorate. These proclamations were to apply mostly to the whites in the territory while the Batswana remained under the direct authority of their respective diKgosi.⁴⁶ In 1891 the administration of Bechuanaland was placed under the High Commissioner in South Africa. That year, the High Commissioner appointed Resident Magistrates to represent the interests of the British government in the Protectorate. These became known as Resident Commissioners after 1939. This administrative set up meant that the diKgosi reported to the Resident Magistrate who in turn reported to the High Commissioner.⁴⁷

1.3.1 Access to information in Botswana: an historical background

Access to information during the protectorate era was predominantly through verbal means in the assemblies known as Kgotla.⁴⁸ At these assemblies, information on issues of governance was verbally transmitted to citizens who were then given the opportunity to respond and debate on the matter. The platform for access to information and personal expression resulting from it, offered by the Kgotla, has helped build freedom of expression in modern day Botswana, where the traditional axioms *mafoko a Kgotla a mantle otlhe*⁴⁹ and *Mmualebe, o a bo a bua la gagwe*⁵⁰ still apply. However, the Kgotla deliberations were not all inclusive. For instance, during the protectorate era, women had the right to attend Kgotla meetings but were not permitted to express their opinions. Following Seretse Khama's, Botswana's first president, return from exile in the UK in 1956 women slowly gained recognition and

⁴⁶ A Kgosi (singular) and diKgosi (plural) is hereditary leader of a clan in Botswana. A Kgosi dispenses law and order in his area of jurisdiction.

⁴⁷ I Schapera *Tribal innovators: Tswana chiefs and social change, 1795-1940* (London: Athlone, 1970): 1-52.

⁴⁸ The Kgotla refers to the traditional assembly or a place where an ethnic group in Botswana gathers for meetings. Kgotla meetings are convened to try cases or to deliberate on issues of interest to an ethnic group or groups. The Kgotla is also the place from which the Kgosi dispenses their authority.

⁴⁹ Translated this means that all opinions expressed at a gathering are welcome. It therefore means that the public traditionally have a right to free speech and expression.

⁵⁰ This means that each member of the public has the right to formulate an opinion and express it.

were able to express themselves in the Kgotla. Commenting on the Kgotla, Nelson Mandela in his autobiography *Long walk to freedom* said, everyone “who wanted to speak did so. It was democracy in its purest form. There may be hierarchy of importance among the speakers, but everyone was heard...The foundation of self-government was that all men were free to voice their opinions and were equal in their value as citizens.”⁵¹

The capture of the administrative process in records and other information formats was at first confined to the British administrators but eventually filtered down to the diKgosi, other persons that assisted them in the conduct of tribal affairs and to teachers, amongst others. As more and more Batswana became educated and as the public service emerged, the management of records was introduced to document and support the administrative processes.

However, access to governance related information was the preserve of the diKgosi and their assistants, the British administrators and a few other people. Direct access to this information by citizens of the Protectorate was unheard of unless the information appeared in the mass media or was transmitted at Kgotla gatherings.

1.3.2 An overview of the mechanisms enabling access to information in Botswana at the start of the 21st century

As at 2006 Botswana does not have FOI legislation to enable citizens to gain an independent legal right to access government-held information. Access to government-held information by members of the public is made possible partly by section 12 (1) of the Constitution (1966) (see Appendix 1), the Public Service Charter (1992)⁵² (see Appendix 2), the National Archives Act (1978) (see Appendix 3), Parliamentary question-answer sessions, inquiries of select committees of Parliament, commissions and committees of enquiry into different aspects of public affairs, and the various reports agencies of government make available to the public. However,

⁵¹ N Mandela *A long walk to freedom* (London: Little, Brown, 1994): 24.

⁵² The public service charter forms the preface to the Botswana Government *General orders governing the conditions of service of the public service of the Republic of Botswana* (Gaborone: Government Printer, 1996): 3-5.

the absence of FOI legislation means there is a void in enabling members of the public to gain comprehensive and direct access to most information which the government holds and has not made available to them.

For instance, access to government-held information implied in the freedom of expression constitutional provision in section 12 (1) is lacking in many respects. This section, although it is taken to enable citizens to gain access to the information which government holds, does not specifically express this. Instead, access to government-held information is simply implied in its interpretation. As discussed in Chapter 4, constitutional provisions on access to government-held information, whether explicit or implied, are nothing more than pledges. They are an indication that government pledges to enable citizens to have access to the information it holds. The pledges do not state in specific terms which government-held information is accessible, how the information will be accessed and who will be responsible for ensuring that this happens. Rather, governments use the guarantees to exemplify their moral obligations to inform citizens.

Access to government-held information is also promised through the Public Service Charter. As Chapter 7 argues, the Public Service Charter does nothing more than make a similar pledge to that made by section 12 (1) of the Constitution. Just like the constitutional provision in which access to information is implied, it too is worded in generalities that make it difficult for citizens to utilise it to gain access to government-held information.

The National Archives Act is the only legal instrument which gives members of the public an enforceable legal right to gain direct access to archival information derived from government normally after a period of 20 years. The absence of other practical access mechanisms to complement the National Archives Act or to clarify the constitutional provisions or the intentions of the Public Service Charter creates a void in enabling members of the public to gain access to most government-held information which is not archival. According to the Botswana Media Consultative Council (BMCC), this barrier “inevitably creates an environment which encourages unnecessary secrecy in government. This in turn can lead to arrogance in governance and defective decision-making, contributing to low productivity within the civil

service. The perception of excessive secrecy can also lead to decline in public confidence in public institutions.”⁵³ This secrecy that exists in the government also makes it difficult for members of the public to gain direct access to most government information other than that which exists in archival form or which government has decided to put into the public domain. The development of secrecy has led to an environment where government can conveniently cover-up its wrong doings knowing fully well that access to the information it is using or generating is partial and will not reveal all the incongruities of governance.⁵⁴

There are other laws in Botswana which inhibit the free flow of information. Balule and Maripe, in a study they conducted in 2000 to evaluate these laws concluded that two categories existed.⁵⁵ The first category, named prior restraint legislation, is composed of eight laws the government uses in restraining citizens to access official information. Prior restraint laws include: Printed Publications Act, 1968 (section 5), Anthropological Research Act, 1967 (section 3), Post Office Act, 1963 (sections 57-58), Cinematograph Act, 1972 (sections 3-8), Botswana Housing Corporation (Amendment) Act, 1994 (section 10), Public Service Act, 1998 (section 34), Electoral Act, 1968 (section 67) and Prisons Act, 1980 (section 127). These laws have been designed in such a way that citizens have to rely on government to provide the information which they can then gain access to. The other category, named subsequent punishment legislation, is composed of four laws intended to deter access to information by threatening punishment in the event access is made on information which government would have not released into public domain. Subsequent punishment laws include: Penal Code, 1964 (section 91), National Security Act, 1986 (section 5), Corruption and Economic Crime Act, 1994 (section 44) and Botswana Telecommunications Act, 1996 (regulation 94). Combined, these laws restrict citizens into gaining access only to the information which government chooses to release.

⁵³ Botswana Media Consultative Council *FOI Act* Available at <http://www.ibis.bw/~botswanamedia/fa.htm#V>>. Accessed 21/08/06.

⁵⁴ P Birkinshaw *Freedom of information*: 22.

⁵⁵ B T Balule and B Maripe *A quick guide to laws and practices that inhibit freedom of expression in Botswana, a report* (Gaborone: The Media Institute of Southern Africa-Botswana Chapter, 2000): 8.

Holm noted in 1996 that the government of Botswana “is very effective in keeping politically significant information about its operations out of public realm. Frank reviews of agencies and programmes are rarely made public...The reservoir of persons capable of ferreting out critical information on effective government programmes is minimal.”⁵⁶ Holm seemed to be saying that the absence of legislation which obliges government to provide access to information reflecting on and informing its operations is likely to impair the operations of other scrutiny measures like the Auditor General, Parliament, Ombudsman, the media, civil society groups and the ability of the public in questioning government. The absence of this obligation, normally enforced through a specific law enabling the public to gain access to government information, suggests that the operations of the government of Botswana are conducted in secrecy. The government of Botswana appears secretive in its operations at a critical time of democratic change in the world, when the public more than ever before are demanding that governments be more open and more accountable.

Attempts at legislating FOI in Botswana date back to 1997 when the government appointed a Presidential task group to draw up a long-term vision for the country. This effort culminated in a booklet entitled *Long term vision for Botswana: Vision 2016, Towards Prosperity for All*, hereafter *Vision 2016*. One of the recommendations made by the group was that the government should have enacted FOI legislation by 2016. Specifically the recommendation stated that: “Botswana must introduce a freedom of information act that will protect the rights of citizens to have access to information, and to ensure the accountability of all public and private institutions.”⁵⁷ This recommendation was premised on the broader vision: “The society of Botswana by the year 2016 will be free and democratic, a society where information on the operations of Government, private sector and other organisations is freely available to all citizens. There will be a culture of transparency and accountability.”⁵⁸ The recommendation was in line with the Vision’s expectation that through enacting FOI legislation, Botswana will remain just, open, democratic, accountable and transparent, and its citizens will be much better informed about the

⁵⁶ J D Holm ‘Development, democracy and civil society in Botswana’ in A Leftwich (ed.) *Democracy and development: theory and practice* (Oxford: Polity Press, 1996): 104.

⁵⁷ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 34 and 69.

⁵⁸ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 5.

governance process.⁵⁹ Government endorsed this recommendation among others and set up a council to drive preparations towards their implementation.

Another attempt towards legislating for FOI emerged in 1998. During a media dialogue session on 24 April 1998, the then Minister of Presidential Affairs and Public Administration, Ian Khama, invited media stakeholders to make contributions towards drafting of an FOI Bill. To this end, the BMCC in 2000 made a submission *FOI Act*.⁶⁰ By 2003, it appeared that the government had put on hold plans previously advanced towards drafting of an FOI bill. In July of that year, *Mmegi* newspaper reported the then Minister of Communications, Science and Technology, Boyce Sebetlela, saying that promulgating FOI law was not a priority for the Government, but that would not prevent it from collecting information on the legislation and planning for it. The newspaper further quoted him as saying, “the passing of a Freedom of Information Bill is a big exercise and must be followed by an agency to implement it. This will require substantial resources-buildings, people, vehicles, office equipment and many others-thus substantial planning.”⁶¹ During the National Stakeholder Consultations on the Mass Media Communications Bill convened by the Press Council of Botswana on 21 August 2003, Minister Sebetlela reiterated that legislating FOI was still not a priority for his ministry. The priority, he outlined, was enhancing ICT capacities and capabilities throughout the country. Despite FOI being a non-priority area, the minister mentioned that his ministry was collecting information on FOI legislation in Sweden, Ireland and the UK, as the legislation was something which was not understood at the time within the government of Botswana.⁶²

⁵⁹ Botswana Government The Presidential Task Group *Long term vision for Botswana*: 10.

⁶⁰ Botswana Media Consultative Council *FOI Act*.

⁶¹ MISANET/IRIN ‘Botswana press under siege.’ *Mmegi* 20:26 (2003).

⁶² This viewpoint was reiterated in Personal interview with BW/1, 16/12/03.

1.3.3 The development of records management in the Botswana public service

Managing public service records in Botswana is a responsibility entrusted to the National Archives. Botswana National Archives was founded in 1967 and operated through a presidential directive until 1978 when an Act formalising it was enacted. Its original mandate was the identification of public records that were to be kept for posterity, their custody and preservation, and ultimately enabling members of the public to gain access to them.

In 1985 following an organisational review of the Ministry of Home Affairs, the Organisational and Methods department of the Directorate of Public Service Management (DPSM) recommended that the National Public Service Records Services be merged with the National Archives.⁶³ The purpose of the merger was to create “conditions conducive to the improvement and promotion of efficiency and effectiveness of both public Records Management and Archives Administration.”⁶⁴ In 1992 the new mandate on the National Archives was formalised through Permanent Secretary to the President’s circular no.4.⁶⁵ In that circular, the Permanent Secretary to the President prescribed that the National Archives should provide “leadership and professional competency on all matters pertaining to ... records management. In this connection develop internal capabilities to adequately carry out the approved national plans and programmes, monitor their progress and evaluate their outcome.”⁶⁶ In that same year an organisation and methods exercise was conducted on the National Archives which resulted in the department changing its name to Botswana National Archives and Records Services (BNARS) to reflect its additional role. BNARS was restructured into four divisions namely, archives services, records management, archives and records research, and management.

⁶³ P M M Sebina ‘Management of government registries in Botswana: a new challenge for the National Archives’ unpublished MA dissertation, University College London, 1996: 20.

⁶⁴ Botswana Government, Permanent Secretary to the President ‘Circular No. 4 of 1992, Performance improvement in the public service’ in Department of Public Service Management *Report on ministerial organisation review: national archives and records services* (Gaborone: Government Printer, 1992).

⁶⁵ Botswana Government, Permanent Secretary to the President ‘Circular No. 4 of 1992, Performance improvement in the public service.’

⁶⁶ Botswana Government, Permanent Secretary to the President ‘Circular No. 4 of 1992, Performance improvement in the public service.’

Registry staff in Botswana administer records in government ministries and their respective departments.⁶⁷ The issuance of the 1992 circular saw the transfer of all registry posts (including staff in those posts) from government departments to BNARS. BNARS is now responsible for not only identifying and having custody over archives but also for records management and the welfare of staff that carry out this additional function. Prior to this change, there was no formal structure for managing records that captured and supported current government business. Each government department managed records in its own way without following any standardised procedure. As a result, records were managed haphazardly and their management was generally given low priority. This change to the National Archives was meant to lead to improvements in delivery of the public service.

By the end of 1995, government, through the leadership of BNARS, had established a records management cadre with its own separate scheme of service. Registry personnel forming part of BNARS establishment were then seconded to the various government departments to provide records management services. From 1999 onwards BNARS started recruiting records managers at graduate level who were posted to ministries and departments to provide oversight and leadership in matters of management of records.

1.4 Statement of the research problem

The importance of FOI legislation in the democratic process has gained international recognition. Countries around the world have come to realise the capacity of the legislation not only in enhancing democracy but also in improving accountability, trust and open governance. When Botswana adopted *Vision 2016* the country was recognising that in order to sustain and improve democracy, the governance process needed to be opened up more to external scrutiny. This was done after realising that in a democracy, citizens are the main stakeholders in the governance process and it was crucial that they be empowered to hold government accountable. It therefore became apparent that Botswana needed to devise strategies which would enable the varied information needs and uses of citizens to be met. The

⁶⁷ The registry system of managing records was inherited from the country's former coloniser the UK.

desire by the country to legislate FOI as a part of its 2016 national aspirations was meant to improve access to official information so as to empower citizens to better hold government to account. The question that arises is whether Botswana needs FOI legislation. If it does, what are the shortcomings of its current measures which allow citizens to gain access to official information? Further, if the country needs the legislation, is it ready for it?

Botswana has various mechanisms ensuring that the public can gain access to government information but these are limited in that citizens do not have comprehensive access to most information held by government. Government determines the information which the citizens can gain access to, it determines when they can gain access, as well as the format which the information will be in. Citizens seeking to gain access to official information are at the mercy of government since they lack a practicable right which enables them to easily gain access to information, as and when they want to, without waiting for what government makes available. The missing link appears to be the lack of FOI legislation which will enable citizens to gain a legal and practicable right to access government-held information.

A review of the literature indicates that countries lacking FOI legislation are more likely to be secretive, have their decision-making processes obscured from public scrutiny and become breeding grounds for corruption.⁶⁸ Pope observed that if democratic states are to flourish, the public must be informed on the operations of government, policies drawn and how they are being implemented.⁶⁹ The same understanding is shared by *Article 19*, a global campaign for free expression⁷⁰ which argued that the absence of FOI legislation impairs democratic development as the public is unable to “participate effectively in the process of government, make informed choices about who should govern them and properly...scrutinise officials to ensure corruption is avoided. Government officials...also fail to benefit from public

⁶⁸J Pope *TI source book 2000, confronting corruption: the elements of a national integrity system* (Berlin: Transparency International, 2000): Chapter 24. Available at <http://www.transparency.org/publications/sourcebook>. Accessed 21/08/06.

⁶⁹J Pope *TI source book 2000, confronting corruption*.

⁷⁰Article 19 is the Global Campaign for Free Expression. It derives its name from Article 19 of the Universal Declaration of Human Rights.

input which could...improve their decisions.”⁷¹ This is the current state in which Botswana is caught.

However, access to information through FOI legislation presupposes access to among others, records. Records, as sections 1.2.1-1.2.3 have shown are the by-products of governance. Other than support and document the governance process, records can provide citizens with information and evidence, hence knowledge about how government operates. It is therefore crucial that in as much as legislating FOI is a national aspiration which Botswana expects to have realised by 2016, the efficacy of public sector records management should also be part of the national aspirations. It is these records which once FOI has been legislated, will be relied upon to provide citizens with information and evidence of the workings of government. Improving democracy and accountability through FOI legislation should be premised on good public sector records management.

1.5 Aim and objectives of the study

Vision 2016 envisaged that Botswana should enact FOI legislation to enhance the democratic process of the country. The adoption of the legislation is meant to enable citizens to gain improved access to information which includes direct access to records thereby enhancing accountability and trust within the country. The main purpose of this study is to investigate Botswana’s preparedness for FOI legislation through evaluating current approaches to public sector records management and the provision of access to information to citizens.

The specific objectives of this study are to:

1. Establish the importance of access to information to the governance process;
2. Work out the reasons behind underpinning access to information in constitutions;

⁷¹ Article 19 *Freedom of information in Southern Africa* (London: Article 19, 2000)’ Available at <<http://www.article19.org/pdfs/publications/southern-africa-foi-no.-16-.pdf#search=%22freedom%20of%20information%20in%20southern%20africa%22>> . Accessed 21/08/06.

3. Find out the reasons countries enact FOI laws while having constitutional provisions for access to information;
4. Determine the role played by records management in the facilitation of access to information;
5. Explore the importance of FOI legislation in records management processes of the public sector;
6. Unravel and decipher the relationships that bond records management and FOI;
7. Ascertain Botswana's preparedness for the introduction of FOI legislation through an evaluation of its present access to information regimes;
8. Determine Botswana's preparedness for the introduction of FOI legislation through an evaluation of the current approaches to the management of public sector records.

Derived from these objectives, research questions which the study seeks to answer are as follows:

1. What is the importance of access to information in the governance process?

This question will enable the study to explore objective 1. Specifically, the question seeks to establish the purpose of access to information in the democratic process.

2. Why have some countries underpinned access to information in their constitutions?

In order to meet the demands of objective 2, this question seeks to establish the reasons some of the case study countries have had to protect access to information in their constitutions. It also seeks to explore the types of constitutional protection afforded to access to information.

3. What are the reasons which have led some countries to enact FOI laws while they have underpinned access to information in their constitutions?

Objective 3 seeks to find out the reasons some case study countries have had to enact FOI laws while access to information is facilitated by constitutional guarantees in their jurisdictions. This question also establishes whether it is necessary for countries to pass specific access laws and how they differ from the constitutional guarantees.

4. What is the role played by records management in FOI implementation?

This question facilitates investigation into objective 4. It seeks to determine the role played by records management in the implementation and enforcement processes of FOI legislation. It also establishes whether the two processes share any close relationships.

5. What is the importance of FOI legislation in the management of public sector records?

This question determines whether the reverse of the preceding one is possible. That is, it seeks to establish whether FOI legislation has any role to play in the management of public sector records. In order to meet the demands of objective 5 this question seeks to establish from case study countries which have legislated FOI the effects the law has had on records management.

6. What relationships do records management and FOI legislation share?

If records management is found to play any active role in the implementation of FOI legislation or the law is found to impact on records management, the two processes are bound to share some commonalities. This question seeks to identify the relationships which records management and FOI legislation share and to determine the implications of these relationships within the governance setup.

7. How prepared is Botswana for FOI?

This question focuses on objective 7 and 8. It aims at investigating the level of preparedness for FOI in Botswana. The extent of the preparedness is assessed through the measures government has in place in enabling citizens to gain access to information. The purpose is to determine the practicability of the measures in enabling the government to facilitate viable and practical access to official information. The question also evaluates the preparedness of Botswana for FOI through reviewing the efficacy of public sector records management in facilitating external access to information by citizens.

1.6 Significance of the Study

The importance of this study lies in the fact that it attempts to situate FOI in Botswana by evaluating the country's preparedness for the law through comparing countries which have enacted the legislation and others which have not done so. It also seeks to uncover the relationships which exist between records management and FOI legislation. This study will make a contribution to the advancement of knowledge into the relationships between the management of records and FOI legislation as a consequence for evaluating Botswana's preparedness for FOI legislation. The study is original in its approach and setting, and the data it uses to assess Botswana's preparedness for FOI law and to unravel the relationships have never been collected before. Also, the choice of the case study countries and comparing their access to information and records management situations provides an original analysis. Access to information in Botswana in relation to records management has not been studied closely before. Therefore, through the employment of the methodology on which the study is founded (discussed in Chapter 3) new insights into both records management and FOI will develop.

Literature reviews of records management and experience of professionals in the field suggest that FOI implementation and utilisation of its provisions is premised on effective records management practices.⁷² Records management in the Botswana public service, as shown above, has undergone major changes to ensure improved service delivery. This study therefore seeks to determine the state of record keeping in the Botswana public service and the extent to which records management practices are ready for the introduction of FOI legislation. It also evaluates the current access to information regimes of Botswana to determine if they warrant the introduction of FOI legislation. In line with the belief emerging from literature and from practitioners in both records management and FOI fields, the study also seeks to establish the relationships between these two processes.

⁷² M McDonagh *Freedom of information law in Ireland* (Dublin: Round Hall Sweet and Maxwell, 1998): 44 and 403-404; United Kingdom Government, Department of Constitutional Affairs 'Lord Chancellor's code of practice on the management of records issued under section 46 of the freedom of information Act 2000' Available at <<http://www.dca.gov.uk/foi/reference/imp/imp/codemanrec.htm>> . Accessed 21/08/06.

The study also seeks to fill in the gaps in the records management and FOI literature which is mostly composed of general textbooks which explain and provide guidance on the utilisation of records management or FOI techniques. Unlike those sources, this study offers a resource which includes the evaluation of the broad spectrum of access to government information measures and how these culminate in the need for FOI legislation. The study provides an information resource on which future policy development of the management of public sector records and FOI can be founded.

It is anticipated that this study will benefit public servants, records managers, archivists, legislators, FOI activists, academics and others having an interest in access to information rights and the management of public sector records. This will enable better formulation of information management policy frameworks, including those facilitating access to government-held information.

The study is also significant in that the government of Botswana and those of other countries anticipating promulgating FOI legislation can learn through the experiences gained in the various case study countries selected. These countries can also learn from the roadmaps suggested in Chapter 8 which are intended to guide Botswana's preparations for FOI. Countries which have legislated for FOI may also adopt and develop certain issues arising from this study to enhance the quality and effectiveness of their legislation. Even those countries who currently are not thinking about legislating for FOI may find the study informative and helpful towards their moral obligations of providing information to their citizens.

1.7 Delineation of thesis

This study is divided into nine chapters. Chapter 1 provides the background and sets the focus of the study. The next chapter reviews pertinent literature and establishes the gaps which this study will fill. Chapter 3 sets out the methodologies guiding the study and discusses how data has been collected and analysed. This is followed by Chapter 4 which discusses access to information and presents an argument positing it as an important tool for government. The chapter argues that

despite the importance of access to information, its constitutional underpinning although significant, is an insufficient framework to enable citizens to gain direct access to information. Chapter 5 particularly argues that the failures of the constitutional guarantees in facilitating practical access to information can be remedied through the adoption of FOI legislation. It further presents that access to information through FOI legislation is dependent on, among other things, good records management. Then Chapter 6 draws out the relationships that exist between records management and FOI. It argues that the relationships have both negative and positive aspects for both government and citizens. It also establishes the implications these relationships have for government and citizens. This is followed by Chapter 7 which makes a detailed assessment to establish the need and readiness of Botswana for FOI. Chapter 8 presents lessons from which Botswana and other countries considering legislating FOI may learn. In addition, it reveals roadmaps which could guide preparations towards full implementation of FOI by Botswana, and those other countries in a similar position. Lastly Chapter 9 draws conclusions and highlights further research areas that arise from this study.

Chapter 2: Literature review

2.1 Introduction

The purpose of this chapter is to review literature which will aid in the evaluation of the access to information situation in Botswana, and to establish the need for FOI in the country through a comparative study. The comparisons will also enable the development and synthesis of the relationships which records management shares with FOI legislation, including the implications of these relationships to case study countries, especially Botswana. This chapter is not in any way an attempt to review all the literature that exists on records management and FOI but a selection has been made to put this study into perspective.

This literature review is presented in three sections. Section one considers literature from records management which makes presentations on democracy, accountability or other issues arising from governance. It argues that even though records management is considered to enhance democracy or accountability, it is its ability to provide access to information which is most important. Through access to information, records management makes information available to aid creation and documentation of accountability, and it also enhances democracy since informed consent can be achieved including enhancing active citizen participation in governance. This ability to provide access to information links records management with FOI legislation. The next section reviews literature from the FOI domain, which perceives the legislation as facilitating democracy and accountability. It argues that in establishing a legal right of access to information, FOI legislation improves democracy and enhances accountability. However, it shows that FOI legislation is premised on the belief that information exists, a pointer to records management which creates and makes the information available for many purposes, inclusive of FOI. The last section focuses on literature which explicitly or implicitly establishes the link between records management and FOI legislation. The purpose of this section is to evaluate the levels at which records management and FOI legislation relate to each other and the implications of the relationship on democracy and accountability.

This chapter concludes by arguing that the complexity of the relationships that records management and FOI legislation share and their contributions to democracy and accountability demands that a detailed study be undertaken. It also argues that records management is not just a given but an essential component of any effective FOI regime.

2.2 *Records management*

Studies on records management are many and varied. Since the 1990s some have been undertaken under the auspices of the World Bank⁷³ or the International Records Management Trust (IRMT).⁷⁴ Some of these have evaluated the importance of records management to the entire governance structure. The IRMT has produced and made available through its website learning resources derived from these studies for students and practitioners of records management. Other studies are empirically focussed on specialised areas of governance, for instance, accountability in the public or private enterprises, public sector reforms and so on. This section is restricted to some of the literature delving into issues associated with democracy and accountability.

2.2.1 Records management-a tool for democratic accountability

A body of literature exists which examines the role played by records management in the democratic process especially in enhancing accountability internally to organisations and externally to among others, the public. Some literature is sector specific in that it focuses for instance, on commercial banks, public sector and so on. Others are specific to standards released by the International Standards Organisation (ISO), e.g. those seeking to establish the values of ISO 15489.

⁷³ Reports and other documents on the work of the World Bank in the areas of records and archives management are available at

<<http://extsearch.worldbank.org/servlet/SiteSearchServlet?q=records%20management>>.

⁷⁴ Reports and other documents relating to the work of IRMT in this respect are available at <<http://www.irmt.org>>.

Terry Eastwood's paper 'Reflections on the development of archives in Canada and Australia,' presented to the Australian Society of Archivists conference in 1989, appeared to be a precursor to the debate focusing on the existence of relationships between records management and accountability.⁷⁵ This is particularly expressed when he argued that archivists should understand archives as having three values to society: as "arsenals of history," "arsenals of administration," and "arsenals of law." When conceptualised together, these three become "arsenals of democratic accountability and continuity," implying that within democracy, accountability is a continuous process. Eastwood challenged archivists to "spirit an understanding of the idea of archives as arsenals of democratic accountability and continuity into society and into its very corporate and social fabric."

Eastwood argued that records and archives are important in facilitating democratic accountability. In a democracy, states are faced with a two-pronged accountability expectation. On the one hand, accountability has to be performed internally within government, and on the other hand, government needs to develop measures of accounting externally to citizens and other stakeholders. Although Eastwood's paper portrayed the importance of records for democratic accountability, it did not discuss access to information as a factor in the accountability process. In addition, since the paper was presented in Australia seven years after the country had adopted FOI legislation, it could have examined access to information through FOI legislation as capable of enhancing accountability. By so doing, the paper would then have established a link between records management and FOI legislation through the evaluation towards accountability. Nonetheless, Eastwood's paper presents a challenge to archivists. This study is a response to it, in that it seeks to evaluate the access to information situation in Botswana and in so doing establish the need for FOI legislation in that country. The study grounds the growth in accountability as deriving from the link between records management with FOI legislation.

⁷⁵ T M Eastwood 'Reflections on the development of archives in Canada and Australia' in S McKemmish and F Upward (eds.) *Archival documents: providing accountability through recordkeeping* (Melbourne: Ancora Press, 1993): 36.

Eastwood's work gave rise to a series of seminars organised by Monash University's Graduate Department of Librarianship, Archives and Records for its postgraduate students in 1992. The seminar papers were brought together in a book edited by Sue McKemmish and Frank Upward.⁷⁶ These papers took up the challenge posed by Eastwood to archivists and started discussions towards the understanding he had called for.

Justus Wamukoya, in his PhD thesis of 1996 evaluating administrative reforms in Kenya, argued that records management, democracy and accountability are interrelated.⁷⁷ In his work, Wamukoya indicated that a country cannot gain comprehensive democracy or execute thorough administrative reforms if its accountability mechanisms or management of public sector records is weak. When governments institute reforms, they have to account for their need and eventual performance externally to parliament and directly to citizens. However, if records management fails to document or provide information and evidence of the activities undertaken, it will fail in providing complete accounts for the reforms. Where this occurs, citizens will not be adequately informed, hence negatively impacting on democracy. Wamukoya's study was undertaken at a time when some African countries were undergoing structural adjustments following recommendations by the World Bank and the International Monetary Fund (IMF). These, at times, necessitated administrative restructuring as well. Although access to information did not feature predominantly in Wamukoya's study as facilitating accountability or enhancing democracy, this could be tied to the fact that at this time FOI had not made inroads into Africa. Thus a research gap exists from Wamukoya's study to create a clear link between access to information (whether by virtue of constitutional guarantees or FOI legislation), records management, accountability and democracy. This study bridges this gap in that it evaluates the importance of access to information through the guarantees and FOI legislation and weaves into this records management, democracy, accountability and trust.

⁷⁶ See S McKemmish and F Upward (eds.) *Archival documents: providing accountability through recordkeeping*.

⁷⁷ J M Wamukoya 'Records management and administrative reform programmes in Kenya' unpublished PhD Thesis, University of London, 1996.

Wamukoya's study was followed by Pino Akotia's PhD thesis in 1997.⁷⁸ Its contention was that 'ailing' or poor management of records can suppress public sector administrative reforms. By focussing on the management of financial records, Akotia showed that where proper management was lacking for these records poor accountability was likely to develop. Poor accountability by government was also likely to contribute to a regression in democratic development of a country. Albeit linking poor records management to failures in government accountability, Akotia's study, just like that of Wamukoya, did not address FOI legislation as a contributor to better accountability by government. Just like Wamukoya's study, Akotia's was carried out at a time when Africa was faced with structural adjustments and fiscal accountability was part of the agenda of these programmes. This study also builds on Akotia's in that it stretches the application of accountability from the ambit of finance to a broader area of democratic accountability to encapsulate access to information. By so doing, and having employed a comparative approach between countries who have legislated access to information through FOI legislation and those who have not, this study establishes the importance of access to information also to the management of records. From the comparative analysis, the study also determines the need for FOI legislation in Botswana as well as drawing the relationships that exists between records management and the legislation.

Victoria Lemieux in her PhD thesis of 2002 mapped relationships between competitive viability, accountability and records management through a case study of Jamaican commercial bank failures. Even though the focus of Lemieux's study was on commercial banks, she nonetheless proved that relationships do exist between records management and accountability in the private sector.⁷⁹ Since FOI legislation can impact on the private sector through contracting out activities of government or privatisation of certain public functions and issues surrounding commercial confidentiality, this study broadened accountability to reflect government-citizens relationships in a democracy and presented it from the access to information viewpoint.

⁷⁸ P T Akotia 'The management of public sector financial records: the implications for good government' unpublished PhD Thesis, University of London, 1997.

⁷⁹ V L Lemieux 'Competitive viability, accountability and record keeping: a theoretical and empirical exploration using a case study of Jamaican commercial bank failures' unpublished PhD thesis, University of London, 2002.

The IRMT undertook a series of studies in many developing countries including Tanzania (2000), Gambia (2001) and Zimbabwe (2000).⁸⁰ In these studies, the IRMT assessed the capacity of records management in facilitating democratic governance generally or specifically assessed the capacity by concentrating on issues like personnel, legislative environment, and financial. More recently, its studies focused on e-records readiness, a venture to establish the readiness of developing countries in terms of various capacity roles in managing electronic records. This process led to the development of a capacity assessment tool named the *Records Management Capacity Assessment System (RMCAS)*.⁸¹ The IRMT has also held seminars and workshops in specific countries e.g. Ghana, where access to information through FOI legislation and its linkages to records management was discussed. These studies by IRMT were conducted with the aim of enabling developing countries to build capacities which would help them manage records better for purposes of democratic accountability.⁸² Despite having conducted seminars on FOI and records management, IRMT has not conducted many detailed studies on records management and FOI law in these countries but has created a context for such studies.

2.3 FOI

The body of literature on FOI is growing, probably as a result of the continued adoption of the legislation by many more countries around the world. By 2006 only four African countries namely South Africa (2000), Angola (2002), Zimbabwe (2002) and Uganda (2005) had enacted the legislation, with many more showing signs of eventual promulgation.⁸³ Most of the literature on FOI in Africa appears to come from South Africa,⁸⁴ with very little from Zimbabwe. The reason may be that the South

⁸⁰ Reports on these studies are available at <http://www.irmt.org/downloadlist/development.html#csEBG>.

⁸¹ RMCAS is hosted at <http://www.nationalarchives.gov.uk/RMCAS/>.

⁸² D Routledge, K Barata and P Cain (eds.) *Proceedings of the information for accountability workshop* (Washington, DC: The World Bank/IRMT, 2000). Available at <http://www.irmt.org/download/DOCUME%7E1/DEVELO%7E1/RESEAR%7E1/GHANA-%7E1.PDF> >. Accessed 21/08/06.

⁸³ R Vleugels 'Overview of FIOA countries worldwide – February 1 2006.' Available at <http://www.statewatch.org/news/2006/feb/foia-feb-2006.pdf>.> Accessed 21/08/06.

⁸⁴ See for instance, South African History Archive available at http://www.wits.ac.za/saha/programmes_foip_02.htm; R Sorensen 'Impact of South Africa's promotion of access to information act after three and a half years: a perspective.' *Esarbica Journal* 22 (2003): 50-63.

African legislation is a far more effective access to information framework than that of Zimbabwe. As for Uganda more literature may emerge as the legislation is put to test and evaluated with time. A lot of FOI literature is available from the developed nations where many countries have adopted the legislation.

Literature on FOI is varied in scope and approach. Some of these are literature produced by civil society campaign groups calling on government to enact the legislation. Others are reviews arrived at after interrogating the functionality of the legislation or providing guidance on using it.⁸⁵ The depth and breadth of the literature varies, with some being empirical studies, others being quantified evaluations of the types of requests and the manner in which they were made. Of these, some are single case evaluations whereby reviews were made of FOI legislation within a country,⁸⁶ and others are multi-case in that more than one country was reviewed and comparisons made.⁸⁷ Some of these literatures are general texts guiding understanding of FOI legislation and facilitating its ease of implementation within specific countries.⁸⁸

2.3.1 FOI: a tool for democratic accountability

Robert Hazell has written broadly on FOI legislation in the UK. For instance in 1999 after the UK released its FOI Bill for discussion he undertook a study to compare the access to information offers made in it with established FOI regimes in Australia, Canada, Ireland and New Zealand. In his study Hazell concluded that the UK FOI Bill would legislate an access to information framework which was going to

⁸⁵ I Currie and J Klaaren *The Promotion of Access to Information Act commentary* (Claremont: Siber Ink, 2002); M Supperstone and T Pitt-Payne *The Freedom of Information Act 2000* (London: Butterworths, 2001).

⁸⁶ M McDonagh *Freedom of Information Law*; D T McKinley *The state of access to information in South Africa* (Johannesburg: Centre for the Study of Violence and Reconciliation, 2003). Available at <<http://www.wits.ac.za/csvr/papers/papmckin.htm>>. Accessed 22/08/06.

⁸⁷ D Banisar *Effective open government: improving public access to government information* (Paris: Organisation for Economic Co-operation and Development, 2005). Available at <[http://www.oilis.oecd.org/oilis/2005doc.nsf/0/cb40b8eb18975d01c1256fd300582d2d/\\$FILE/JT00181243.PDF](http://www.oilis.oecd.org/oilis/2005doc.nsf/0/cb40b8eb18975d01c1256fd300582d2d/$FILE/JT00181243.PDF)>. Accessed 22/08/06; R Martin and E Feldman *Access to information in developing countries* (Berlin: Transparency International, 1998). Available at <http://www.transparency.org/working_papers/martin-feldman/index.html>. Accessed 22/08/06.

⁸⁸ The Campaign for Freedom of Information, *Freedom of information checklist*; J Wadham J Griffiths and B Rigby *Blackstone's guide to the Freedom of Information Act 2000* (London: Blackstone, 2001).

be restrictive compared to the experiences from these other countries.⁸⁹ Hazell did not assess the likely impact of records management on the performance of the proposed law. The Bill which eventually became the UK FOI law of 2000, in section 46, displayed some awareness of the significance of records management to the legislation. Hazell, by studying good records management issues, could have shown, for example, that with good records management the law was not going to be that restrictive after all or that it would be restrictive but good records management had the potential of making the legislation more effective. Failure to include records management evaluation meant that Hazell's study assumed that records management was in place and was working well and thus could not ascertain the limits of the legislation when records management is weak.

Alasdair Roberts has also written widely on FOI. Some of his work focuses on the daily administrative issues resulting from implementing the Act. In some of these Roberts observed that FOI is critical to democracy and accountability and yet obstacles always emerge or are hatched deliberately to impinge on the functionality of the legislation. For instance, he argued that 'spin doctors' consistently materialise in one form or the other to deter FOI.⁹⁰ Some of them capitalise on the empowerment which Information Communication Technologies (ICT) bestow on public servants. Rick Snell shared similar sentiments with Roberts when he argued that the emergence of spin doctors in the daily administration of public affairs has hampered effective use of FOI legislation.⁹¹ However, unlike Roberts, Snell has made attempts to exemplify the impact which records management can have on FOI legislation, as will be seen in section 2.4. Nonetheless, studies by Roberts and Snell have not systematically evaluated the impact or importance of records management to FOI legislation. Most of the time records management is implied in their works or it has not been exhaustively analysed to bring about its relation with FOI legislation.

⁸⁹ R Hazell *Commentary on the draft freedom of information bill* (London: UCL, The Constitution Unit, 1999).

⁹⁰ A Roberts *Access to government information: an overview of issues* (Berlin: Transparency International, 1999). Available at <http://www1.transparency.org/working_papers/roberts/roberts.foi.html>. Accessed 22/08/06; See also A Roberts 'Closing the window: public service restructuring and the weakening of freedom of information law.' (1998) Available at <<http://www.aroberts.us/documents/papers/window.pdf>>. Accessed 22/08/06.

⁹¹ R Snell 'FoI and the delivery of diminishing returns, or how spin doctors and journalists have mistreated a volatile reform.' *The Drawing Board: An Australian Review of Public Affairs* 2:3(2002): 187-207. Available at <<http://www.australianreview.net/journal/v2/n3/snell.pdf>>. Accessed 05/03/06.

Other literature assesses the use of FOI legislation by journalists in informing the public. One such work is by Martin Rosenbaum who compared journalistic use of FOI legislation in Ireland and Sweden. The main aim of Rosenbaum's study was to establish the nature and the extent to which journalists in the two case countries used FOI legislation; how the use was influenced by the differences in the FOI laws, attitudes of public servants and the practice and conduct of the journalists themselves.⁹² Although his study opened with the assertion that: "Journalism is about information, so freedom of information should be good for journalism"⁹³ he did not continue by suggesting that the information to which journalists want access has to be managed and can be contained in records. The assertion that information is all what journalists are interested in disregards the process which ensures the right information is created in the first place and is retained appropriately to serve the various needs for it, including its access internally to support official business or external access to it by citizens. Rosenbaum did not see that some of the information which journalists access through FOI legislation is made possible through the intervention of proper management of records.

Literature from government agencies responsible for the oversight of FOI legislation implementation is mostly concerned with the provision of statistics and other guidelines on the use of the legislation. For instance, the Department of Constitutional Affairs in the UK in June 2005 reported 'Freedom of Information Act 2000, statistics on implementation in central government Q1: January – March 2005.' The report presented statistics on the handling of written requests for access to information by government agencies covered by the Act. These included the number of request received; timeliness of the responses to the requests; outcomes of the requests; fees charged for providing the information requested; the use of exemptions and exceptions on the requests, and reviews and appeals to the Information Commissioner following denial of access to information.⁹⁴ Though such studies are quantitative in that they are concerned with providing statistics and extrapolating meaning from them, they would have benefited from a link with the records

⁹² M Rosenbaum 'Open to question – journalism and freedom of information' (article sent to author as email attachment by Gervase Hood, 20/06/05).

⁹³ M Rosenbaum 'Open to question.'

⁹⁴ United Kingdom government, Department of Constitutional Affairs 'Freedom of Information Act 2000, statistics on implementation in central government, Q1: January – March 2005.' Available at <www.foi.gov.uk>. Accessed 27/06/05.

management process. For instance, they could have interrogated the timeliness of responses to determine the influence which records management would have had.

Other studies on FOI result from initiatives by Information Commissioners. For instance, in 1997 the Information Commissioner in the Republic of Ireland commissioned a study to investigate the practices and procedures of agencies in their attempt to comply with the Irish legislation.⁹⁵ Another in 2003 investigated the effects introduction of fees had on requests for information made by the public.⁹⁶ In some of these initiatives, Information Commissioners have suggested that FOI legislation benefits from proper management of records. None of them however, has attempted to explore empirically aspects of records management which benefit FOI legislation and how they do so, as well as to determine the effect of their absence to successful FOI implementation. Reports from the Information Commissioner of Canada have been particularly outspoken on the need for improved records management to facilitate access to information through FOI legislation in that country.⁹⁷

The above section has shown that literature on FOI is growing as more countries continue to adopt the legislation. Very little of this literature is derived from or focuses on Africa, the reason being the late adoption of FOI in the continent. Even though a lot of FOI literature exists, much of it presumes records management is already effective to support FOI legislation. Although FOI legislation is considered to enhance democracy or to improve the ability of government to account in some of the above works, most authors fail to ascribe this to the availability and access to information.

⁹⁵ Ireland Government, Office of the Information Commissioner *The Freedom of Information Act – compliance by public bodies* (Dublin: Office of the Information Commissioner, 2001).

⁹⁶ Ireland Government, Office of the Information Commissioner *Review of the operation of the Freedom of Information (amendment) Act 2003* (Dublin: Office of the Information Commissioner, 2003).

⁹⁷ The reports are available at Canada Government, Office of the Information Commissioner of Canada <<http://www.infocom.gc.ca/reports/default-e.asp>>.

2.4 Records management and FOI

Records management and FOI are distinctive processes, with one capable of existing without the other. However, where they both exist, they have the potential of relating to one another. FOI legislation is expected to facilitate access to information while records management is expected to create, manage and make the information available for access. Even where one is present and the other is lacking or is weak, the one present might indicate the need for or enhancing of the other. Some of the literature addresses these issues, or considers other aspects of the relationship between records management and FOI legislation.

2.4.1 Records management and FOI: features of democratic accountability

Rick Snell undertook a study in the Tasmanian public service, Australia.⁹⁸ His study took place a few months after the Freedom of Information Act of Tasmania 1991 had commenced operation in January 1993. The purpose of his study was to evaluate the impact of FOI legislation on records management since the adoption of the law. Guiding the study were four objectives:

1. to determine the contributions made by FOI legislation in improving records management;
2. to determine other factors that might have led to improvements in records management;
3. to determine the relationship between factors identified in number 2 with FOI legislation;
4. to assess the viability of the assumption of FOI legislation having benefits in improving records management.

Snell's findings indicated that at the time of the study FOI legislation had had very little impact on records management. The reasons for this might emanate from the fact that the FOI law in terms of operation was relatively new and as a result it was not expected to have made substantial impact. In defending his findings however,

⁹⁸ R Snell 'The effect of Freedom: Is FoI a benefit or threat to records management practices?' delivered to the 10th National Convention Records Management Association of Australia, Hobart, 5-8 September 1993. Available at <<http://www.law.utas.edu.au/foi/articles/records.html>>. Accessed 22/08/06.

Snell argued that “it maybe that the connection between FoI and records management is a far more coincidental one rather than a causal linkage” but also recognising that there might be further improvements in the offing for records management.⁹⁹ By so saying he seemed to suggest that records management and FOI legislation did not have a direct relationship rather that this emerges as a coincidence of their processes. Snell’s contention on the link being coincidental does not negate the belief that records management is important in the FOI processes. Indeed he acknowledged that there is a link, which suggests records management and FOI legislation share certain relationships.

Snell’s work could have benefited from an extensive case study comparison rather than restrict himself to Tasmania which had just legislated FOI. Had Snell extended his study to include other territories of Australia which had enacted a similar law, he may have come across different experiences resulting from the relationships which records management shares with FOI legislation. More relationships may also have been identified if he had compared the territorial experiences with that of the Australian Commonwealth government which had enacted FOI in 1982. Despite the shortcomings of conducting a study when the legislation was still at its infancy and failing to extend the Tasmanian experiences to other territories, Snell’s study showed that relationships exist between records management and FOI legislation.

Andrew McDonald in 1997 undertook a comparative study covering Australia, Canada and the Republic of Ireland. His findings concluded that improved management of public sector records was essential to the successful implementation of FOI legislation. He argued that this could result from the knowledge that most government information was managed through the records management process, and it was this information which is crucial to FOI. The knowledge that it can be brought into the public domain triggered the need to improve management of public sector records and the information they capture. This is an indication that records management and FOI legislation share a bond.¹⁰⁰

⁹⁹ Rick Snell ‘The effect of freedom’

¹⁰⁰ A McDonald research culminated in a book he edited with Gregg Terrill. A McDonald and G Terrill *Open government: freedom of information and privacy* (Basingstoke: Macmillan, 1998).

In 2000 Jay Gilbert carried out a study to evaluate the response of the Canadian public service to FOI following its legislation in 1982.¹⁰¹ Employing Richard Laughlin's organisational theory models, Gilbert evaluated the impact FOI legislation had on the management of government records. His findings indicated that public officers were managing records in a way that defeated the purpose FOI. In Gilbert's view the Canadian public service was resisting change towards more transparent governance brought about by FOI legislation. Specifically, some sectors of the public service were resorting to the avoidance of committing decisions to records or some altered records because they feared that the decisions they made would end up in the public domain. Resisting change brought about by FOI legislation was evident in actions like privatising of some public service functions and contracting others out. As a direct consequence, records resulting from and supporting the privatised or contracted-out functions were also removed from coverage of the Act.

Gilbert's findings also indicated that in an attempt to thwart prospects of growing transparency of processes, the government of Canada resorted to increasing access fees and/or introducing exemptions that were too broad. This attitude by government created within the public service a mentality that records created by public servants were their own personal purview and access to them was an intrusion into the functions they execute. As a result of this mentality, records were at times altered or decisions made were not recorded.

It was clear from Gilbert's study that FOI legislation can have a negative impact on records management. Although the study fell short of explaining in detail the records management processes which FOI affects, how it affects them, and the solutions to the problems, it was a definite indication that the two processes share certain relationships.

¹⁰¹ J Gilbert 'Access denied: The Access to Information Act and its effect on public records creators' *Archivaria* 49 (2000): 84-123.

In 2003, the National Archives of Canada through a team composed of K Badgley, M J Dixon and P Dozois undertook a study to determine the validity of Gilbert's findings.¹⁰² Guiding their study were the following themes:

1. Content of records;
2. Quantity of records- to determine changes in their volume;
3. Scope of files;
4. Control over records;
5. Other observations.

In their study this team evaluated the themes with reference to how records were managed prior and post FOI legislation in seven areas of the government of Canada. Their findings indicated that instead of having a negative impact on records management as Gilbert indicated, FOI produced positive results. This they attributed to the knowledge that records in the public service were not created for the purposes of FOI legislation but to document government execution of public processes.¹⁰³

This study was followed by a commentary by Forsyth. In this commentary, Forsyth argued that Gilbert's study and the one conducted under the auspices of the National Archives reached different conclusions because of their divergent focus and emphasis. He noted that Gilbert's study determined the effects of FOI legislation on public service behaviour in administering access to information rights and their impact on records management. This he argued, underlay the findings of Gilbert. Badgley, Dixon and Dozois only sought to address the records management issues over others that Gilbert studied. The differing findings aside, Forsyth believed that both studies provided considerable insight into possible implications of FOI legislation on records management.¹⁰⁴

¹⁰² K Badgley M J Dixon and P Dozois 'In search of the chill: access to information and record-keeping in the government of Canada' *Archivaria* 55 (2003): 1-19.

¹⁰³ K Badgley M J Dixon and P Dozois 'In search of the chill': 1-19.

¹⁰⁴ I Forsyth 'Access law and lost records: a commentary on 'In search of the chill' *Archivaria* 55 (2003): 21-26.

In 2003 Peter Sebina argued that a symbolic relationship existed between records management, FOI legislation and good governance.¹⁰⁵ Further in 2005 Sebina argued that access to information was made possible either through constitutional guarantees or FOI legislation, but still maintaining that FOI laws have some form of bond with records management.¹⁰⁶ In 2003 Sheila Edward and Julie McLeod undertook a study in 15 colleges in northern England.¹⁰⁷ In their study, Edward and McLeod found that FOI legislation can have implications for records management. In this regard they found that the level of awareness of FOI legislation and its relationship to records management was increasing steadily among their selected cases. Although Edward and McLeod's study and Sebina's, purport that records management can impact on FOI legislation or is impacted upon by FOI, they do not concisely elaborate on the relationships these two processes share.

Other studies determining the impact of FOI legislation on records management or vice versa have been carried out by Offices of the Information Commissioners in various jurisdictions. Reports of these studies indicate that FOI legislation can have both a positive and a negative impact on records management and that records management can also have similar effects on FOI laws. For instance, the 2001 report of the Information Commissioner of the Republic of Ireland stated that there was no evidence to suggest that records were not being created or were undergoing alteration as a result of FOI law in that country. Instead there were indications that FOI legislation contributed to improvements in management of public sector records.¹⁰⁸

¹⁰⁵ P M Sebina 'Freedom of information, records management and good governance-any symbolic relationship?' *Esarbica Journal* 23 (2004): 45-50.

¹⁰⁶ P M Sebina 'Access to information: The role of Freedom of information legislation and constitutional guarantees' *Esarbica Journal* 24 (2005): 52-68.

¹⁰⁷ S Edward and J McLeod 'Is the freedom of information act driving records management in further education colleges?' *Records Management Journal* 14:1 (2004): 40-50. Available at <<http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldFullTextArticle/Articles/2810140105.html>>. Accessed 05/03/06.

¹⁰⁸ Ireland Government, Office of the Information Commissioners *Annual report 2001* (Dublin: Office of the Information Commissioner, 2002). Available at <<http://www.oic.gov.ie/en/Publications/AnnualReports/2001/File.513,en.pdf>>. Accessed 22/08/06.

2.5 Conclusion

Many studies have been conducted on both records management and FOI. Some of these suggest that records management and FOI legislation share some commonalities while others see each as a distinct process and operating independently without any sign of relationships. Those which see them as sharing commonalities either view each as having the capacity of impacting on one another or imply records management is a given for FOI legislation. The ones which see them as distinct processes are either evaluative in nature or focus on specific issues emerging from each, for instance, the number of requests made, the types of requests received (FOI), the purpose of records management in hospitals, railways and so forth.

FOI literature just like that of records management is broad and dynamic. The FOI literature ranges from studies evaluating the efficacy of the legislation from a day-to-day administrative function to general assessments of responses to the law. Of these studies some are comparative in nature while others are single country analyses. Other than looking at statistical issues ranging from the number of requests and their types, some of these studies interrogate all the implementation issues ranging from approaches to handling requests or making them, to reviewing and making recommendations for improved utilisation. Some trace the historical developments of the legislation globally, regionally or to specific countries, and others provide interpretations of the laws. However, few of these works provide a succinct link between FOI legislation and the management of records. Most imply that records management already exists and is well capable of supporting FOI.

Records management literature is multifaceted in that it covers a number of issues in both the public and private sectors. Of these some are sector specific and focus on the likes of commercial bank records, school records, court records, finance records, personnel records and so on. Only a few of these move beyond discussing records management as a facilitator to the above specific areas into issues like access to information, e.g. records management as a facilitator of access to information either through the constitutional guarantees, FOI or Privacy legislation.

This study builds on the literature discussed in this chapter. It seeks to fill some of the gaps emanating from the reviewed works by establishing the importance and the role played by access to information in the democratic process. The study establishes that both records management and FOI legislation can work together to create comprehensive and functional access to information regime. Records management creates and manages information, and in the process it makes information available for access. When FOI legislation is adopted, consideration has to be made to the fact that some of the information to which it guarantees access, is in the form of records. Hence, any effective FOI regime cannot ignore the benefits it can derive from good records management.

Chapter 3: Research design and methodology

3.1 Introduction

Part of the purpose of this study is to unearth relationships between records management and FOI legislation, and to establish Botswana's readiness for FOI through evaluating public sector records management and the country's access to information regimes. These evaluations are then compared to those emerging from the other case countries thus providing a learning resource for Botswana, and for other countries which might adopt FOI legislation.

In researching this study the author adopted qualitative research methods which could facilitate the in-depth comparison of professional and lived records management and FOI experiences across the case study countries. The approach made it possible for a rigorous exploration to be undertaken in determining the relationships and also delineate modalities which Botswana and others may follow once FOI legislation is adopted.

3.2 Theoretical framework

Some of the underlying assumptions of qualitative research methodology made the approach especially suitable for this study. Firstly, it assumes that social events and resultant behaviour are best understood when studying them in their natural setting. To this end, qualitative research examines study phenomena through the experiences of respondents in relation to it. The experiences are presented in a descriptive manner which enables the researcher to gain in-depth knowledge and understanding of the social world through the perspective of respondents, and based in the context within which they live and work.¹⁰⁹ This research could not be carried from afar i.e. through questionnaires. The author had to be present at every data collection session so as to discern and appreciate the values respondents placed on records management and FOI legislation. Being there in person enabled the author to

¹⁰⁹ G E Gorman and P Clayton *Qualitative research for the information professional, a practical handbook* (London: Library Association Publishing, 1997):245-248; S J Taylor and R Bogdan *Introduction to qualitative research methods, a guidebook and resource* 3rd edn. (New York, NY: John Wiley and Sons Inc., 1998): 7.

understand the relationships between records management and FOI legislation from differing perspectives and backgrounds.

Secondly, qualitative methodology believes that the behaviour of respondents towards a phenomenon is best understood through the meanings they attach to it. This assumption also demanded the presence of the author in all data collection sessions which enabled a full exploration into the meanings respondents attached to records management and FOI legislation and how the two interrelate.

The third assumption is that in order to understand the meanings respondents attach to a phenomenon researchers should interact with them and appreciate the factors that contribute to the meanings. This enabled the study to understand the relationships based on the meanings respondents ascribed to them.

This study could have opted for a quantitative approach where the emphasis is on measurement in terms of quantity, frequency and so on, among different variables.¹¹⁰ However, the need to understand the relationships between records management and FOI legislation, especially with the purpose of informing a country without FOI experience, meant that the study was better premised on a methodology that allowed for full exploration of the meaning and purpose of the concepts. The quantitative approach would have been beneficial if the study was, for example, making evaluations among case countries having FOI legislation or evaluating the types of request for information that are made. However, for this study, quantitative methods would have generated results which were not conducive to a detailed understanding of the relationships in the case study countries.

3.2.1 Grounded theory

The qualitative nature of this study is premised on the grounded theory approach. Grounded theory as a qualitative research inquiry methodology was

¹¹⁰ For detailed discussions on how qualitative and quantitative methodologies differ and relate see generally N K Denzin and Y S Lincoln (eds.) *Strategies of qualitative enquiry* (Thousand Oaks, CA: Sage Publications, 1998):8-11 and W L Neuman *Social research methods* 5th edn. (Boston: Allyn and Bacon, 2003):16, 139-145.

developed by Glaser and Strauss in the 1960s.¹¹¹ Grounded theory is a “methodology of analysis linked with data collection that uses a systematically applied set of methods to generate an inductive theory about a substantive area.”¹¹² Grounded theory, therefore, is a research method in which theory is developed from conceptualising and understanding the data collected. It recognises that there are two types of knowledge reacting during the research activity. First, a respondent brings knowledge to the research through being a participant. The researcher too has knowledge that enables them to interact with the respondent in generating more knowledge on the phenomena under study. Grounded theory aims at the explorative and interpretative understanding of the meanings respondents attach to their lived experience and harnessing of knowledge from particular phenomena.¹¹³ In this study, respondents brought their knowledge and experiences with working with records management, FOI legislation or both. The researcher too brought similar knowledge gained from his professional background as a lecturer in archives and records management. Armed with this knowledge base, the researcher and respondents were able to interact and explore issues seeking to establish the relationships.

Data collection in grounded theory building is not based on any preconceived theory rather data collection and its analysis lead to the development of theory.¹¹⁴ That is, the grounded theory approach does not seek to test or confirm trends in a particular theory. Rather, its intention is to build a theory which can be used to explain and understand a phenomenon. This study did not seek to test any theory; its premise was interacting with respondents to unravel relationships between records management and FOI legislation. Nonetheless, through this grounded theory interaction, certain theoretical explanations of the relationships were developed. For instance in section 5.5 three hypotheses have been unearthed. The purpose of unearthing these is to provide future studies on records management and FOI legislation with some theoretical guidelines which they could explore, thus

¹¹¹ For a detailed discussion see B Glaser and A Strauss *The discovery of grounded theory: strategies for qualitative research*, (New York: Aldine de Gruyter, 1967); A Strauss *Qualitative analysis for social scientists* (Cambridge: Cambridge University Press, 2003).

¹¹² B Glaser *Basics of grounded theory analysis* (Mill Valley: Sociology Press, 1992): 16.

¹¹³ K Charmaz ‘Grounded theory, objectivist and constructive methods’ in N K Denzin and Y S Lincoln (eds.) *Handbook of qualitative research*, 2nd edn. (Thousand Oaks, CA: sage Publications, 2000):510.

¹¹⁴ D Ezzy *Qualitative analysis: practice and innovation* (London: Routledge, 2002):7.

contributing to further development of knowledge in records management and FOI regime.

Consistent with grounded theory building, this study did not begin with identifying a hypothesis to be tested. It instead designed research questions aimed at guiding data collection. Interview guides were derived from the research questions to guide the interaction between the researcher and respondents leading to a detailed exploration of themes to shed light into the purpose of the study.

3.3 *Setting of the study*

This study follows a multi-site case approach. Five case countries were selected for the study. These are Botswana, Malawi, Ireland, South Africa and the UK. The case study countries were selected following a number of precedents. Firstly, all the case countries have adopted the Westminster parliamentary democracy system together with its administrative structures. Secondly, they all have ratified the International Covenant on Civil and Peoples Rights (ICCPR). Thirdly, they belong to one or more of these groupings: United Nations (UN), African Union (AU) or the European Union (EU). Fourthly, they regulate access to government-held information either through FOI legislation, constitutional guarantees or both. Lastly, all have a system of managing public sector records.

The selection of the diverse set of comparative case study countries is influenced by, among other things, the fact that all of them share some common background. Botswana, Malawi, South Africa and the Republic of Ireland were once dependencies of the UK and have inherited from her various aspects of Westminster parliamentary democracy and administrative structures. Malawi and South Africa's choice as case studies is also influenced by the fact that both countries are newer democracies in sub-Saharan Africa, while Botswana has a much older democratic tradition. They thus provide a slightly different, but comparative perspective. Furthermore, both countries have constitutional guarantees on access to government information which are very explicit, unlike that of Botswana which is implied. Their guarantees specifically pronounce that members of the public can gain access to

government information, while that of Botswana is implied through the constitutional provision on self expression. Unlike both Botswana and Malawi, South Africa's constitution made a declaration calling for the enactment of legislation to fulfil realisation of the rights protected by the guarantee on access, and this the country has achieved in 2000. Malawi, just like Botswana, currently regulates access to government information mainly through the constitutional guarantee but, unlike Botswana, discussions towards legislating FOI in Malawi are at an advanced stage.

Choosing the three African countries is also based on their membership of the Southern African Development Community (SADC), the AU and the fact that they have ratified the African Charter. The countries are also members of the Commonwealth along with the UK. The choice of all the five case study countries is also influenced by their having ratified the ICCPR. Another factor influencing the choice of four of the case study countries is that they have all inherited from the UK the registry system of managing records.

Apart from being a former colonial power and having ruled over the other case study countries and sharing certain governance traits with them, selecting the UK is also founded on the country having enacted FOI legislation in 2000. The Republic of Ireland is also selected because of similar legislation enacted in 1997 and in common with the UK, belonging to the European Union. Two other countries, Australia and Canada, have been selected not as case countries but to provide some benchmarks for the study. Both countries are former dominions of the UK and have had FOI legislation since 1982. Their experience with both records management and FOI legislation is invaluable to understanding the relationships this study seeks to discover.

3.4 *Study population*

When this study began it was relatively easy to select case countries because of the qualities noted in section 3.3. Selecting the respondent population within the cases, however, was difficult. The reason for this emanates from the qualitative approach adopted. In qualitative research, a study may determine the population to be

studied only to realise that emerging data are not enough to address the problem being studied. A different study may determine the sample size from the onset only to realise that data becomes saturated before the entire population has been covered.

Determining the ratio of the various professionals in terms of their experience in records management, FOI or both was also difficult. Linked to this was determining the number of respondents who could qualify as representative of a larger population. To unravel this maze, theoretical sampling was employed. This sampling technique refers to:

selecting groups or categories to study on the basis of their relevance to your research questions, theoretical position...and most importantly the explanation or account which you are developing. Theoretical sampling is concerned with constructing a sample...which is meaningful theoretically, because it builds in certain characteristics or criteria which help to develop and test your theory and explanation.¹¹⁵

Respondents within case countries were selected on the basis of their knowledge and experience with constitutional guarantees on access to information, FOI legislation and records management. These constituted records managers, archivists, librarians, lawyers, clerks of Parliament, Information Commissioners, Ombudspersons, independent observers, consultants and academics. Such a diverse selection illuminated different perspectives on the relationships the study seeks to establish. Also, the diversity in terms of the background of the respondents meant that the modalities which the study draws are informed by the rigorous nature with which the research questions were discussed. Such a wide selection of case countries and respondents resulted in a deeper exploration of the research problem and better triangulation.

Theoretical sampling allows a study to qualitatively collect data and analyse it simultaneously. In the process, decisions are made on what more data to collect and from whom it should be collected.¹¹⁶ Selecting respondents through theoretical sampling is based on the belief that their ability, knowledge and experiences with records management and FOI legislation will be invaluable in dissecting and grouping

¹¹⁵ J Mason *Qualitative researching* (London: Sage Publications, 1996):93-94.

¹¹⁶ Y Darlington and D Scott *Qualitative research in practice, stories from the field* (Buckingham: Open University Press, 2002):52.

of elements within the relationships being uncovered and assist in developing grounded theory.¹¹⁷ Theoretical sampling is not concerned with the study population being a representation of the wider population. Instead, the selection of respondents is based on the 'conceptual questions' the study seeks to answer. As Miles and Huberman argued, to arrive at a construct "we need to see different instances of it, at different moments, in different places, with different people. The prime concern is with the construct...not the generalization of the findings to other settings."¹¹⁸ This technique enables the study to be investigative and exploratory while allowing sampling to be done in tandem.¹¹⁹

Theoretical sampling has three commonalities. First, it ensures that cases are selected to aid the theory being developed. In the scope of this study, case study countries and the respondents within them are knowledgeable and experienced in records management and FOI functionalities and practices, hence are instrumental towards development of theoretical bases for the relationships being uncovered. Second, it allows for cases deviant to the study to be selected. In this regard, two case study countries (Botswana and Malawi) without FOI legislation have been included. The inclusion of these led to in-depth analysis of FOI legislation as against constitutional guarantees on access to information which the deviant cases possess. Third, it also allows the study to change the size of the sample as it progresses.¹²⁰ As data was being collected it was also analysed without waiting for it to accumulate. The purpose of doing this was to determine the level of saturation of data themes and concepts being developed. This helped in determining the need for more data collection and subsequent addition of more respondents, thus changing the sample size every time this occurred.

To aid the development of a theoretical sample this study also used the snowballing technique. Through the technique, the researcher identified a respondent who in turn introduced him to other respondents knowledgeable and/or experienced in

¹¹⁷ U Flick *An introduction to qualitative research* (London: Sage Publications, 1998):65.

¹¹⁸ M B Miles and A M Huberman *Qualitative data analysis: an expanded sourcebook* 2nd edn. (Thousand Oaks, CA: Sage Publications, 1994):29.

¹¹⁹ M B Miles and A M Huberman: 29.

¹²⁰ D Silverman *Doing qualitative research: a practical handbook* (London: Sage Publications, 2000):105.

records management and FOI.¹²¹ This meant that as respondents were identified through theoretical sampling they in turn *snowballed* the researcher to others experienced in issues relating to the problem being studied or provided contacts which the researcher was able to follow up.

The process of sampling was facilitated by constant analysis and comparison of themes and concepts emerging from the data. Where gaps were identified, it was an indication that further data collection was needed to address the shortcomings. This led to the adding of more respondents guided by the methods discussed above. The process of analysing data and identification of more respondents continued until the themes and concepts guiding the analysis were saturated indicating that any emerging data added nothing new towards meeting the objectives of the study.

Through theoretical sampling and snowballing the study ended up with a population of 45. A further 14 individuals in all the case countries were approached but failed to respond to the researcher's telephone calls and email messages. Of the 45 respondents, 7 were from Botswana, 5 from Ireland, 9 from Malawi, 5 from South Africa, 17 from the UK, Australia and Canada each had 1. A full list of all the respondents and their breakdown according to country is provided in Appendix 4.

3.5 Data collection tools

Data collection was achieved through qualitative in-depth interviews. In-depth interviews enabled the researcher to collect data on different perspectives regarding records management and FOI legislation. In-depth interviews possess several strengths. Among them are:¹²²

1. Data collection is flexible. In-depth interviews enabled the researcher to collect data through everyday conversation. The interviews were face to face, making data collection immediate. Where issues that were raised were unclear, immediate clarity was sought and provided. This strength allowed

¹²¹ S J Taylor, and R Bodgan *Introduction to qualitative methods*: 93.

¹²² Y Darlington and D Scott *Qualitative research in practice*: 49-50.

for the collection of data which was candid and well informed on thematic issues surrounding records management and FOI legislation.

2. Generating meaning is cumulative. Since in-depth interviews are an active process, both the respondent and interviewer pay attention to the context and content of the interview. In doing so, they are able to discuss fully elements of records management and FOI legislation thereby generating meaning and adding to it as they converse. Each interview added meaning onto that which was already generated.
3. They are useful for studies where research phenomena cannot be observed directly. Relationships between records management and FOI legislation are things that cannot be observed directly, much along the same lines as seeking to understand the behaviour of children in a nursery school setting. Therefore, the adoption of in-depth interview techniques enabled the study to solicit from respondents thoughts, feelings and opinions on issues that could not be observed directly. As a consequence, in-depth interviews enabled respondents to share their experiences which ultimately informed distinct categorisation of the relationships between records management and FOI legislation.
4. In-depth interviews enabled the study to have access to what respondents say, the meanings they attach to the functionalities between records management and FOI legislation, and their experiences with them. In other words, in-depth interviews are not inclined towards observing what respondents do, rather they enable respondents to share with the researcher their experiences through narration.

Despite these strengths, in-depth interviews have some shortcomings. The interviews are built on personal interaction and thus are open to bias: because of this they may be uncritical. In-depth interviews involve the researcher and respondent creating some form of personal relationship that facilitates a relaxed atmosphere leading to free conversation which culminates in data collection. The bond that is created between the researcher and respondent can lead to bias. For instance, some researchers may place respondents on a scale (from being more informative to least informative) thereby generating bias against some respondents. This could lead to salient details of the interview being ignored thus compromising the quality of the

research. For this study, the author sought to avoid creating such bias by emphasising to himself that data collection was not just about the spoken word but other factors such as facial expressions, pauses, gestures and so on, which contributed to the meaning derived from the conversation. This approach, and immediate data analysis, enabled swift evaluation of each interview and where elements of bias were detected these were rectified through further email discussion on issues which the bias may have compromised.

Linked to this is the uncritical nature of some in-depth interviews. The author was at times at the mercy of respondents who were knowledgeable and experienced in records management and FOI legislation. They would resort to discussing issues which were not central to the study. So as not to be seen as critical or discrediting the view-point addressed, the author had to find ways of diverting the attention of the interview back towards the tenets of data collection.

At times the interviews were time consuming especially where a respondent was the 'I know all type' who wanted to take charge of the interview and discuss issues they felt were important. In this study the researcher found a way around such respondents by applying a courteous and diplomatic reprimand along the lines 'that is very true but how...' thus returning the conversation to the issues at hand. This at times took a long time as a respondent would veer away once again necessitating a repeat of the 'reprimand.'

Related to this is the issue of transcribing the interviews. This took a long time to accomplish but was necessary in that the transcribed data identified gaps which future interviews had to fill. Transcribing the data, despite being time consuming, also enabled the researcher to identify thematic elements which needed clarity and hence contacts were made with the respondents to discuss the issue(s) further.

The questions asked at the interviews were premised on two interview guides (see Appendix 5). Both guides sought to explore similar records management and FOI issues which would culminate in the relationships between the two being unearthed and understood. The interview guides were piloted on one SLAIS postgraduate student and on three University of Botswana lecturers. On each occasion

the guide was amended to cater for additional issues which were identified as the data collected was analysed.

The first guide focussed on case countries which have already legislated FOI while the second on those without the law but with indications that it was being considered. The use of the guides enabled the researcher to explore with each respondent a range of topics without necessarily tying the interview process to a list of fixed questions. This approach was conducive for this study in two respects. The assumption was the respondents were knowledgeable and experienced in records management and FOI legislation and the guide was used to elicit their views on issues relating to the research objectives. The use of the guide also enabled the author to take control of the entire interview process.

Data collection commenced in South Africa and Botswana between July and September 2003, with more collected in July and September 2004. In Malawi data was collected during August 2004 and in Ireland in December 2004. Since the author was primarily based in the UK, data collection in that country was continuous from 2003 until the beginning of 2005.

Lastly, data collected was corroborated through reviewing secondary sources. The author visited libraries and read around issues of records management, constitutional guarantees on access to information and FOI legislation. In doing so, the researcher was able to develop more themes and concepts which contributed to better analysis and substantiation of the arguments the study advances.

3.6 Data analysis

Data analysis in qualitative research occurs in tandem with data collection. Data collection informs its analysis and vice versa.¹²³ If qualitative data analysis is left until all data has been collected, a researcher is likely to miss out on many things that may emerge from the data. This problem is more profound in grounded theory building in that data analysis that is left until late or when all data is presumed

¹²³ G E Gorman and P Clayton *Qualitative research for the information professional*: 5.4

collected can make it difficult for a study to notice problems and gaps that it did not anticipate. Trying to pursue these after all the data has been collected and analysed may prove futile. The process also enables a researcher to review research questions if the emerging data suggests so. Research questions that were initially drafted for this study were later recast to cater for the gaps identified during the initial data collection and analysis. For instance, the initial research questions were limiting in that they were not sufficiently flexible for purposes of a comparative study. Most of the questions were premised on the preparatory work for FOI legislation in Botswana thus making it difficult to establish the need for the legislation in the country beforehand. The inflexibility also worked against exploring the importance behind access to information which culminates in its constitutional protection and ensuing implementation through FOI legislation.

Since the study was not guided by any hypothesis and the population sample size was not determined from the outset, inductive reasoning was used to aid data analysis. Inductive reasoning implies that whatever is analysed emerges from the data itself as there is no hypothesis to test against.¹²⁴ Inductive reasoning was achieved through what Glaser and Strauss call the constant comparative method.¹²⁵ In terms of grounded theory building, data collection and its simultaneous analysis is important as it is “assumed the researcher will not know all the important research questions, sampling dimensions or theoretical concepts before they begin collecting data. The research questions, the sampling frame and the theoretical concepts are discovered only while data are being collected.”¹²⁶ This makes grounded theory building grounded in the data as it emerges.

Once data was collected through tape recordings, the researcher personally transcribed the recordings. Listening and transcribing the tape recordings enabled the researcher to reflect back on the interview process and the outcome was a properly defined understanding of each respondent’s exploration of records management and FOI. The process also led to the identification of any omissions, generalisations and

¹²⁴ P Maykut and R Morehouse *Beginning qualitative research: a philosophic and practical guide* (London: Falmer, 1994):126.

¹²⁵ B Glaser and A Strauss *The discovery of grounded theory*: 101-116.

¹²⁶ D Ezzy *Qualitative analysis*: 61-63.

clarifications that other interviews were to address.¹²⁷ At times the omissions or generalisations were resolved through follow-up interviews or email communication.

Transcription of interviews was followed by coding of the data. Through coding, data was classified into logical and meaningful themes and concepts which were necessary towards understanding the relationships which the study sought to uncover.¹²⁸ As new meaning emerged from the coded data, it was compared to other units of meaning that had previously emerged from earlier analysis. Ultimately similar units of meaning were grouped together thus contributing to data driven conceptualising of the assumed relationships. This process of constant comparison of data continued throughout data collection and its analysis.¹²⁹

Initial coding and the comparisons were performed manually while in the interim the researcher honed his skills of using N6, a version of the Non-numeric Unstructured Data * Indexing, Searching, Theorizing (NUD*IST) qualitative research software for data analysis developed by QSR International in Australia. The choice for this software was arrived at after having conducted literature review and follow up discussions with Drs. V. Lemieux and O. B. Molwane both of whom used it during their PhD studies. N6 accepted all the interview transcripts that were generated and enabled the author to carry out coding and conduct searches across the interviews to ascertain elements of data which related to set codes or themes. Using the software enabled the author manage the huge data elements which the in-depth interviews had generated. However, using the software did not replace the interpretative process of qualitative research as this was done by the author. Detailed discussions on usage of N6 in this study appear in Appendix 6.

Interview information in this thesis has been categorised according to case study country. For instance, interviews conducted in Botswana have been coded BW followed by an ascending number reflecting whether the interview was the first,

¹²⁷ G E Gorman and P Clayton, *Qualitative research for the information professional*:249.

¹²⁸ G W Ryan and H R Bernard 'Data management and analysis methods' in N K Denzin and Y S Lincoln (eds.), *Handbook of qualitative research* 2nd edn. (Thousand Oaks, CA: Sage Publications 2000):780-781.

¹²⁹ P Maykut and R Morehouse *Beginning qualitative research*:134.

second, and so on in the specific country. The same convention has been applied to email communication with respondents in Australia and Canada.

3.7 Validity of the research findings

Much qualitative research is concerned with the descriptive accuracy of an account given. Viewed from this perspective qualitative research is interested in how an account is accurately reflective of a phenomena being studied.¹³⁰ This accurate representation of an account is referred to as the ‘truth’ or ‘validity.’¹³¹ Validity in this study has been achieved through the use of the constant comparison method discussed in section 3.6. Constant comparison was first performed within a case study country and later across other case study countries. The results of the comparisons were also compared with data emerging from email discussions with respondents in Australia and Canada and those from the reviewed literature.

Through constant comparison, portions of data were analysed to identify themes and categories that arise. These were used to explain the hypotheses which developed during data analysis and additional data collection. The process continued until data collection was saturated and data analysis comprehensively dealt with.

In validating the accuracy of the relationships which exist between records management and FOI legislation this study also borrowed a strategy employed by Dr. Victoria Lemieux in her PhD study on “Competitive viability, accountability and record keeping: a theoretical and empirical exploration using a case study of Jamaican commercial bank failures.” To achieve this she had the following questions at the back of her mind:¹³²

- Does the respondent have a reason to lie? In other words is the respondent’s account valid?
- How does a respondent’s account of the phenomena being studied tally with accounts of other respondents?

¹³⁰ J A Maxwell ‘Understanding and validity in qualitative research’ in A M Huberman and M B Miles *The qualitative researcher’s companion* (Thousand Oaks, CA: Sage Publications, 2002):45.

¹³¹ D Silverman *Doing qualitative research*: 175 and 188.

¹³² V L Lemieux ‘Competitive viability, accountability and record keeping:’408. Further discussion on this tactic is available in I Seidman *Interviewing as qualitative research: a guide for researchers in education and the social sciences* 2nd edn. (New York: Teachers College Press, 1998): 17.

- Does the respondent provide all the information sufficient for the researcher to conclude that the account accurately represents the phenomena being studied?
- Did the researcher in anyway help the respondent answer a particular question? That is, did the respondent provide an answer without taking cues from the researcher or the researcher did offer a cue?
- If someone else were to conduct the interview would the response be different?

The guidance provided by these questions made the constant comparative method more effective. As each interview was relived through transcribing and ultimate analysis, the above questions were asked of the data elements. Answers that emerged out of asking these questions were also compared across other interviews. This technique was appropriate because through “interviewing a number of participants, we can connect their experiences and check the comments of one participant against those of others.”¹³³ The result of this process was a valid or a truthful account of the relationships that emerged between records management and FOI legislation.

¹³³ I Seidman *Interviewing as qualitative research*: 17.

Chapter 4: Access to information: a core component of government

4.1 Introduction

Access to information is a core component of government for five key reasons all of which necessitate its constitutional underpinning. First, access to information makes a critical contribution to the democratic process. Second, access to information shares with freedom of expression a complex dynamic relationship. Third, access to information offsets the problems of information asymmetry. Fourth, access to information can play a significant role in managing state secrecy. Fifth, access to information can be used to promote and protect personal privacy. This chapter argues that whilst access to information is a vital pre-requisite for democracy, the legal, administrative and cultural framework for FOI legislation must be designed and administered to cater for variable user demand, access and capacity.

Access to information has a close relationship with freedom of expression which may be thought of as simple, while it is complex, dynamic and multi-faceted. This relationship is shown through international and regional treaties of the UN, EU and the AU.¹³⁴ After ratification of the treaties, these bodies either established offices to have oversight over freedom of expression and assist in unravelling its intentions or adopted declarations which highlighted this relationship. An assessment is made of the impact of the treaties and this relationship in the case study countries. Particularly, the relationship between access to information and freedom of expression has resulted in four of the case study countries giving both constitutional protection separately or jointly.

In demonstrating the role played by access to information to the democratic process, the chapter argues that democracy is founded on the existence of informed consent and participation by citizens in the governance process. Underlying access to information is the expectation that citizens should show interest in information for

¹³⁴ See section 4.2.

them to gain access to it. Since interest for information is variable, there is need for a defined framework to enable varied access, as and when the need arises. Access to information is also shown as having capacities to manage problems of information asymmetry (discussed in section 4.4.2) and state secrecy (discussed in section 4.4.3). Several methods (including the media and the parliament) can be employed in attempts to reverse the asymmetries. However, this study shows that their efforts can bear fruit only when access to information is enforced through FOI legislation. State secrecy plays an adversarial role to the democratic process. It facilitates the growth of asymmetries as it contributes to less citizen participation in governance, and an escalation in corruption because of its ability to restrict both the flow and access to information. Access to information indicates a move away from secrecy but its real effectiveness is only possible through FOI legislation.

Access to information and the relationship it shares with freedom of expression mandates countries to give it constitutional underpinning. The basis for constitutional protection is derived from the authority ascribed to constitutions. Constitutions are considered supreme laws and are enforceable through the courts and are subjected to stringent amendment procedures. Once constitutionally protected, access to information attains supremacy and all the other qualities incumbent in constitutions. However, despite attaining constitutional prominence, access to information still lacks depth and qualification, in other words, it lacks a framework for its effective implementation. This problem is resolved by the adoption of FOI legislation.

The chapter concludes by stressing that access to information (whether by constitutional, quasi constitutional, specific legislation, administrative practice or culture) is a vital prerequisite of an effective democracy. However, the need to resort to that access will be variable in terms of timing, frequency and quality. Regardless of the variations, an individual or groups of individuals need access to be guaranteed whenever they decide to or feel the need to access information. It is therefore vital that an access to information framework be put in place and able to deal with the variable demands and the wide variations in users from the first time illiterate user to the seasoned professional journalist. It is as a result of the need for the framework that

access to information must be both constitutionally supported and put into practice through FOI legislation.

4.2 Access to information, the relationship with freedom of expression

Access to information has been associated with freedom of expression for a long time. The two are different sides of the same coin, although at times they are taken to be one thing, and at other times, one is taken to cause the other. Access to information enables free expression and free expression is lame without access to information. Consequently, access to information and freedom of expression share a relationship which may be thought as simple or causal but is in fact complex, dynamic and multi-faceted or even pre-determinative. It is a relationship which is hard to pin down but nevertheless its understanding depends on whether you view it from an access to information or freedom of expression perspective. In this section, this relationship will be shown as free standing; one which has beneficiary-obligatory attributes; freedom of expression will be shown as effectuated by access to information, and that to accept one necessitates the acceptance of the other. This relationship will be shown through international and regional treaties of the UN, EU and the AU. The reason for this selection is that all the case study countries have ratified either one or more of these treaties which relate access to information and freedom of expression.

4.2.1 United Nations

As early as 1946, the UN through *Resolution 59 (1)* declared that: “Freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated.”¹³⁵ Although the resolution did not specifically single out access to information as a human right, it nonetheless implied it in the mention of freedom of information. Chapter 1 has argued that FOI is a law facilitating and regulating access to information. Therefore, access to information, by virtue of the legal protection afforded by FOI legislation, is a cornerstone on which all the other rights the UN expects citizens of its member states to enjoy are founded. The

¹³⁵ United Nations *Yearbook of the UN 1946-1947* (Geneva: United Nations, 1948): 176.

resolution may particularly focus on the UN but this organisation is made up of membership from the entire globe. Hence, access to information as a right radiates from within the UN to the member states composing it. The fact that access to information through FOI has been recognised as a fundamental human right by the UN is taken to suggest that member states should also recognise it as such.

During its sitting in 1948, the UN ratified the Universal Declaration of Human Rights (UDHR). Article 19 of this treaty stated: “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹³⁶ This is an article widely referred to in the literature as guaranteeing public access to information through advocating that citizens should be able to ‘seek, receive and impart information.’¹³⁷

Article 19 of the UDHR protects two fundamental rights namely ‘freedom of expression’ and ‘freedom to hold opinions.’ Although it does not explicitly state that members of the public can have access to information, it nonetheless creates an impression among governments that the public should be free to express themselves. According to Martin and Feldman “Freedom of expression presupposes something to express. Therefore, access to information is inextricably tied to freedom of expression. The words to ‘seek, receive, and impart’ are set out in the Universal Declaration as if they were the constituent parts of one indivisible right.”¹³⁸ ‘Expression’ denotes the ability to speak and to write, both of which are reliant on access to information. People speak and/or write because they are informed and thus have something to express. Forming and holding of opinions also rely on people being informed. It is evident that the right ‘to seek, receive and impart information’ embedded in access to information precedes the ability of individuals to express the thoughts and opinions they hold and would want to share. Article 19 thus implies that citizens have the right to discover information through its access.¹³⁹ It is through access that citizens develop the power of enquiry into any system of governance they

¹³⁶ United Nations *Yearbook of the UN 1946-1947*: 176.

¹³⁷ See for instance Article 19. Available at <<http://www.Article19.org>>. Accessed 18/02/03

¹³⁸ R Martin and E Feldman ‘Access to information in developing countries.’ (Berlin, Transparency International, 1998). Available at <http://www.transparency.org/working_papers/martin-feldman/1-what.html>. Accessed 07/04/03 and 22/08/06.

¹³⁹ Personal interview with UK/5, 02/03/04.

are subjected to.¹⁴⁰ Through being exposed to the processes of government and its activities by virtue of access to information, citizens are better placed to enquire into the system of governance which has been adopted and accede to its legitimacy. One respondent postulated that within the notion of free expression are three important freedoms.¹⁴¹ These are:

- Freedom to hold opinions without interference;
- Freedom to receive ideas and information without interference;
- Freedom to communicate ideas and information without interference.

Embedded in each of these three factors is access and free flow of information. That is, the desire to hold opinions is achievable when someone has access to information so as to form the opinions. Forming of opinions also relies on the capacity and ability to impart them, made possible by free flow of information. The free flow of information encapsulating free expression, leads to cross fertilisation of opinions which can result in improvements to be made on the ones that already exist. In receiving ideas and information, individuals are able to reflect on them and formulate their outlook and outcome through further access to information and its eventual impartment. The freedom within which ideas and information are communicated assists in generating interest for access to information and is a catalyst for improved communication networks.

Restricted access to information impedes the ability of individuals in sharing ideas and opinions. And restricted communication of ideas and opinions inhibits access to information about them.

In view of the above discussion, by acceding to the UDHR, member states of the UN appear to accept that:

- Freedom of expression is a right;
- Freedom of expression means the ability of citizens to:
 - Hold opinions and to be allowed to express them;

¹⁴⁰ Personal interview with UK/6, 10/03/04.

¹⁴¹ Personal interview with BW/4, 02/08/04.

- Seek information and to receive it and ultimately express it through a media of choice.
- There would be minimal interference in executing the right. Where interference is to be made, it should be justifiable within domestic law and should not contravene prescriptions of the UDHR. This intimates that there is a requirement for the existence of some form of framework to guard against the purported interferences if they are to occur.

The UDHR has not been without criticism. One criticism levelled at it, is its failure to associate the ability of individuals to express themselves freely with a government's obligation to facilitate the right. The critics view the treaty as a moral statement of principles without any legal standing. At its inception, the UDHR was not binding on signatories but was more of a pledge by member states to facilitate enjoyment of freer expression. In this respect, the treaty was taken to fall below the expressions of *Resolution 59 (1)* which also indicated that the ability of citizens to express themselves depended on the willingness and capacity of a government to ensure that the right is exercised without abuse.¹⁴²

The UDHR was followed by the International Covenant on Civil and Political Rights (ICCPR) in 1966 which eventually came into force in 1976. The ICCPR was partly a response to criticisms of the UDHR. Article 19 (2) of the ICCPR stated: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."¹⁴³ Thus the ICCPR merely reiterated what is already expressed through the UDHR.

¹⁴² United Nations *Yearbook of the UN 1946-1947*: 176.

¹⁴³ United Nations *International Covenant on Civil and Political Rights*: Article 19. Available at <<http://www.hrcr.org/docs/Civil&Political/intlcivpol4.html>>. Accessed 20/10/04.

Unlike the UDHR, the ICCPR (through Article 2 (2) and (3)) created a legal obligation on signatories to enforce freedom of expression in their jurisdictions. Further, they were also obliged to establish or introduce mechanisms that would address infringement on the right so protected.¹⁴⁴ Although the treaty did not authoritatively declare that access to information should be protected and enforced as well, this was implied since the covenant recognised that the ability to express freely was dependent on access. The ICCPR was thus of the view that freedom of expression needed to be regulated at domestic level, and governments through adherence to these two articles are making an undertaking towards doing so. By establishing this obligation, the ICCPR seemed to be of the view that it is one thing to sign a declaration and another to commit oneself to its undertakings.

4.2.2 United Nations Commission on Human Rights

Although freedom of expression is generally upheld by signatories to the UDHR and the ICCPR, the United Nations Commission on Human Rights (UNCHR) felt that the right needed oversight. The reason behind this might be that at the inception of the UN in 1945 and for some decades later, access to information and freedom of expression were treated as distinct processes. While access to information became implied in the UDHR, uncertainty remained in its relationship with freedom of expression. It appears that implying access to information in freedom of expression was a direct influence of the developments in Sweden, Finland and others who through their FOI laws established this link. Thus, in 1993, the UNCHR established the Office of the Special Rapporteur on Freedom of Opinion and Expression and Abid Hussain was appointed to it. His mandate encompassed among others the need to clarify the manifestation 'freedom of expression' as an internationally recognised right. In his 1995 report he observed that:

[T]he right of everyone to receive information and ideas has to be carefully protected. This right is not simply a converse of the right to impart information but it is a freedom in its own right. The right to seek or have access to information is one of the most essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if the people have no access to

¹⁴⁴ United Nations *International Covenant on Civil and Political Rights*: Article 2.

information. Access to information is basic to the democratic way of life.¹⁴⁵

Hussain's observation indicated that access to information in as much as it facilitates free expression is in itself a free standing right. What is implied in this observation, in line with the ICCPR, is that access to information needs a separate mechanism for its protection, one similar to that accorded freedom of expression. Such protection will ensure that access to information is not just seen as a part of freedom of expression but it will also ascertain that infringements on the right are guarded against.

That same year Abid Hussain went on to caution governments against withholding information from public purview and recommended that this tendency be placed under scrutiny.¹⁴⁶ This was a further acknowledgement that access to information is a free standing right, although not dispelling the fact that it has ties with freedom of expression. In 1998 he declared that freedom of expression "imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems."¹⁴⁷ In 1999 he discerned that the citizen's right to access information so as to be abreast with what government is doing on their behalf is contained in freedom of expression.¹⁴⁸ In these two latter reports, it became clear that access to information includes that which is held by the state. Thus states are expected to have in place mechanisms that will foster freer access to government-held information.

¹⁴⁵ United Nations, Commission on Human Rights *Report of the Special Rapporteur, Mr. Abid Hussain submitted pursuant to Commission on Human Rights resolution 1993/45* (E/CN.4/1995/32): 9-10. Available at

<http://daccessdds.un.org/doc/UNDOC/GEN/G94/750/76/PDF/G9475076.pdf?OpenElement>. Accessed 02/03/05.

¹⁴⁶ United Nations, Commission on Human Rights (E/CN.4/1995/32): 10.

¹⁴⁷ United Nations, Commission on Human Rights *Report of the Special Rapporteur, Mr. Abid Hussain submitted pursuant to Commission on Human Rights resolution 1997/26* (E/CN.4/1998/40): 4. Available at

<http://daccessdds.un.org/doc/UNDOC/GEN/G98/103/12/PDF/G9810312.pdf?OpenElement>. Accessed 02/03/05.

¹⁴⁸ United Nations, Commission on Human Rights *Report of the Special Rapporteur, Mr. Abid Hussain* (E/CN.4/1999/64): 5-7. Available at

<http://daccessdds.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>. Accessed 02/03/05.

It is clear from these reports that freedom of expression is effected by access to information. In fact, both are indispensable to democracy. Freedom of expression enables citizens to express their thoughts, ideas and share other insights into the governance structure and conduct. Access to information facilitates the process of expression through providing information needed to shape ideas and thoughts and in creating an environment where informed consent can be given to government. The significance of access to information is realised only when members of the public can freely express themselves about and on the information to which they have gained access. Both these rights create a beneficiary-obligatory relationship. On the one hand, members of the public are beneficiaries of freedom of expression and of access to information, and on the other, government is obliged to provide access to information and to ensure that an environment conducive to free expression exists.

Through ratifying the ICCPR, the case study countries were binding themselves to facilitating both access to information and free expression. Since the ICCPR created an obligation on them to protect freedom of expression, it did the same for access to information. The expectation is that when countries protect freedom of expression they should do the same for access to information.

4.2.3 European Convention on Human Rights

The European Convention on Human Rights (ECHR) was ratified in 1950 by some European countries and came into force in 1953. Article 10 (1) of the treaty stated: "Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."¹⁴⁹ What this article seeks to protect is freedom of expression and it does not single out access to information as being guaranteed or protected. However, as indicated above, in order for individuals to express themselves effectively, they need access to information including that held by government.

¹⁴⁹ Council of Europe *European Convention on Human Rights: Convention for the protection of human rights and fundamental freedoms*. Available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>. Accessed 02/11/04.

Article 10 (1) has a direct connection with Article 19 of the UDHR. Both articles protect freedom of expression and access to information is implied through categorically stressing that citizens have the right to receive and impart information. The reason for the similarities in their formulation might result from the desire to uphold and promote the principles of Article 19 of the UDHR and hence, the importance of reiterating them in the ECHR.

In 1982, the Council of Europe Committee of Ministers adopted the 'Declaration on the freedom of expression and information.' Through the declaration, the members of the EU observed that both freedom of expression and access to information were fundamental to the democratic dispensation inclusive of rule of law and respect for human rights. As a result, they committed their countries to "the pursuit of an open information policy in the public sector, including access to information." The declaration went on to further challenge member countries to guard against infringements on freedom of expression and access to information.¹⁵⁰ Two case study countries, the UK and Ireland, are members of the EU and both have subscribed to the above article and declaration.

The ECHR appears to have had some influence in the drawing up of constitutions of the former dependencies of the UK. Balule, making reference to a 1992 case heard by the Court of Appeal of Botswana between Unity Dow and the Attorney General supports this view. Balule observed that the Court of Appeal in this case concluded that guaranteeing and protecting rights in the "constitution of Botswana was greatly influenced by the ECHR, which the U.K. had ratified and applied to its dependent territories."¹⁵¹ Otlhogile also added that the British "bequeathed to their former colonies written constitutions as the framework of institutions, powers, procedures and rights, which became invested with an accepted authority."¹⁵² Hence, when the UK was ready to cede administration in these former dependencies, she played a leading role in the formulation of the constitutions which

¹⁵⁰ Council of Europe, Committee of Ministers *Declaration on the freedom of expression and information*. Available at <<http://cm.coe.int/ta/decl/1982/82decl.htm>>. Accessed 23/09/05.

¹⁵¹ B T Balule 'Enhancing the media's democratic role: a comparative study of the legal environment of the media in Botswana and South Africa' unpublished PhD Thesis, University of Edinburgh, 2003: 98.

¹⁵² B Otlhogile 'Constitutional development in Botswana' in W A Edge and M H Lekorwe (eds.) *Botswana: politics and society* (Pretoria: J. L. van Schaik Publishers, 1998): 153.

finally granted independence to these territories. In support, Otlhogile observed that “Botswana’s constitution was adopted for her by the colonial power at the time of its withdrawal...the constitution was made by the colonial power.”¹⁵³

One thing is particular about the guarantees on freedom of expression contained in some of these constitutions. These declare and protect access to information as an enabler of freedom of expression. Many of these have also worded the protection of freedom of expression in much the same way, and have followed the same style in asserting and implying access to information within free expression.¹⁵⁴ This is a sign that the formulation of these constitutions was premised on a model which the UK thought as conducive for adoption by her former dependents. Another observation is that the UK does not have a written constitution, yet when her former dependents were preparing for independence, the country made certain that they adopted constitutions that were written. Considering that freedom of expression and access to information were to be protected subject to Article 2 (2) and (3) of the ICCPR, it is no surprise that the UK pushed for the adoption of written constitutions, and for the inclusion of freedom of expression in them for her former dependencies.

4.2.4 African Union

All the three African case study countries are party to the AU’s Charter on Human and People’s Rights of 1981. Article 9 (1) of this charter expressed: “Every individual shall have the right to receive information...Every individual shall have the right to express and disseminate his opinions within the law.”¹⁵⁵ Effectively, this article protects two rights. It protects access to information and freedom of expression. Thus, signatories of this charter are also expected to uphold and protect the said two rights.

¹⁵³ B Otlhogile ‘Constitutional development in Botswana.’ 154.

¹⁵⁴ See for example *Constitutions of Kenya* (1969 amended in 1997). Available at <<http://www.kenyaconstitution.org/docs/The%20Kenyan%20Current%20Constitution.pdf>>. Accessed 02/09/05. and Jamaica (1962 amended in 1994). Available at <<http://pdba.georgetown.edu/Constitutions/Jamaica/jam62.html>>. Accessed 02/09/05.

¹⁵⁵ African Union *Charter on Human and People’s Rights*. Available at <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>>. Accessed 01/05/05.

In 2002, the African Commission on Human and Peoples' Rights which is charged with the oversight of the Charter adopted the 'Declaration of Principles on Freedom of Expression in Africa.' The declaration reiterated that "[public] bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information."¹⁵⁶ The declaration was thus clear that access to government information is a right which citizens ought to enjoy. The assumption arising out of this is that governments are expected to facilitate realisation of this right. In other words, governments have to ensure that citizens can gain access to public information whenever they have the desire to do so.

Part IV (2) of these Principles stated:

- Everyone has the right to access information held by public bodies;
- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest;
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which could disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society;
- Secrecy laws shall be amended as necessary to comply with FOI principles.¹⁵⁷

Part IV (2) undoubtedly showed that access to information is an important undertaking which needs to be regulated. Since access is considered as a right to be enjoyed by citizens, it suggests that governments should have in place a system that will regulate and promote access to government-held information. In fact, it also implies that there is need for the adoption of FOI legislation as the last bullet-point shows.

¹⁵⁶ African Union, The African Commission on Human and Peoples' Rights *Declaration of Principles on Freedom of Expression in Africa*. Available at http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution67_en.html>. Accessed 02/03/05.

¹⁵⁷ African Union, The African Commission on Human and Peoples' Rights *Declaration of Principles*.

Part XVI went on to urge signatories to make every effort to turn the principles into a reality. Therefore, the expectation arising out of this clause is that the respective countries should devise strategies that will ensure that their citizens can gain access to government-held information.

4.3 Impact of articles on freedom of expression on case study countries

Freedom of expression professed by both international and regional treaties has had significant impact for the signatories. Most, if not all, saw this as a direct challenge and obligation towards facilitation of freedom of expression and guarding against infringements on it. Some of these went on to further facilitate access to information as an enabler of freedom of expression or as a right in its own stead. Many of the countries either passed specific laws or other forms of policies, while others sought constitutional protection for them.

All the case study countries were signatories and had ratified either the UDHR, the ICCPR or one of their regional treaties advancing freedom of expression, so they made attempts to protect and guarantee this right. All the case study countries which were former dependents of the UK did so through constitutional provisions, some of which tied access to information with freedom of expression.¹⁵⁸

An example is derived from Botswana. Section 12 (1) of the country's constitution stated:

Except with his consent, no person shall be hindered in the enjoyment of the freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.¹⁵⁹

¹⁵⁸ Botswana Government *Constitution of Botswana* (Gaborone: Government Printer, 1966); Ireland Government *Constitution of Ireland* (1937): section 40.6.1°. Available at <<http://www.taoiseach.gov.ie/upload/publications/297.htm>>. Accessed 13/03/03.

¹⁵⁹ Botswana Government *Constitution*.

This section demonstrates the influence of the ECHR, which in turn has been influenced by the UDHR. Access to information is in these instruments, a facilitator of freedom of expression, as reflected in section 12 (1) of the constitution of Botswana. The freedom ‘to receive... information’ is for the sole purpose of facilitating freedom of expression. It is thus difficult to suggest that section 12 (1) of the constitution of Botswana guarantees and protects access to information as a free and independent right separate from freedom of expression. It is obvious in this section that freedom of expression is the primary right which is being accorded constitutional protection and that access to information is only implied through ‘freedom to receive...information...’ The implication arises only when the section goes on to qualify what freedom of expression entails through the use of ‘that is to say...’ Thus, the Botswana constitution has followed in the benchmarks set by the UDHR, ICCPR and the ECHR in linking access to information with freedom of expression. It is also obvious that the section does not consider access as an independent right.

The impact of the treaties on freedom of expression is somewhat different in the South African constitution of 1996. Section 16 expressed:

- Everyone has the right to freedom of expression, which includes
 - a. freedom of the press and other media
 - b. freedom to receive and impart information and ideas
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.¹⁶⁰

The impact is different for two reasons. Being of recent formulation compared to that of Botswana, the drafters of the South African constitution may have evaluated that country’s past history of exclusion under the apartheid regime. During the apartheid era which was legally formalised with the election into power of the National Party in 1948, freedom of expression was defined along racial lines. The White communities, more than the African and Asian population, were at liberty to freely express themselves. However, in 1983, the Asian and Coloureds of South Africa were allowed to establish their own separate parliamentary chambers while the Africans

¹⁶⁰ South Africa Government *Constitution of South Africa* (1996). Available at <<http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>>. Accessed 13/03/03.

were not.¹⁶¹ The 1996 constitution of South Africa was meant to reverse the legacy of apartheid by creating an equitable environment where freedom of expression or any other rights and freedoms were not adjudged by race. Freedom of expression and all the other rights and freedoms became a right for all citizens of South Africa to enjoy. Hence, the country's history with apartheid appears to have necessitated the detailed qualification of the constitutional protection of freedom of expression.

One other thing that is distinct about the South African constitution is that section 32 (1) protects and guarantees access to information as an independent right:

Everyone has the right of access to
a. information held by the state; and
b. any information that is held by another person and that is required
for the exercise or protection of any rights.¹⁶²

Taken together, both guarantees by the South African constitution affirm that access to information is on the one hand, a facilitator of freedom of expression and on the other, an independent right. It is observed that through the manner in which it protects the right to expression and access to information, the South African constitution complies with the prescriptions of Article 2 (2) and (3) of the ICCPR and Part IV (2) of the Declaration of Principles on Freedom of Expression in Africa, a depth which the constitution of Botswana lacks.

Malawi through section 35 of its 1994 constitution stated: "Every person shall have the right to freedom of expression."¹⁶³ Unlike Botswana or South Africa, the constitution does not provide a qualification as to what the right entails. However, based on the arguments previously advanced, it is suggested that access to information is implied through this constitutional protection. There is a danger lurking in such unqualified constitutional underpinning of freedom of expression. In stating that freedom of expression is the preserve for everyone without additional qualifications, creates room for abuse of the right. The Malawi government can be tempted to disregard access to information as a facilitator of free expression since it is

¹⁶¹ J L Gibson *Overcoming apartheid: can truth reconcile a divided nation?* (New York, NY: Russell Sage Foundation, 2004): 31.

¹⁶² South Africa Government *Constitution*.

¹⁶³ Malawi Government *Constitution of Malawi* (1994). Available at <http://www.sdn.org.mw/constitut/intro.html>. Accessed 13/03/03.

unclear in the constitution what freedom of expression entails. This has the capability of creating litigation which might seek to have the right qualified.

In line with constitutions of newer democracies, Malawi through section 37 of its constitution, guarantees access to information as an independent right¹⁶⁴ thus affirming also that access is not just a preserve for free expression. In as much as access to information is in itself an independent right demanding a discrete constitutional protection, the government of Malawi should nonetheless strive to meet the basic requirements of the ICCPR and others which provide a link with free expression. This necessitates qualification of the right to expression whilst retaining access to information as a separate right.

Ireland presents an interesting exemplar. The country became independent through her constitution of 1937. This was over ten years before the UN declared that access to information is a right and before the UDHR was ratified and many more years before the ECHR and the ICCPR came into fruition. The 1937 constitution guaranteed and protected freedom of expression through section 40.6.1° which expressed that: “The State guarantees liberty for the exercise of the following rights, subject to public order and morality: i. The right of the citizens to express freely their convictions and opinions.”¹⁶⁵ If freedom of expression subsumes access to information as already argued, then this Irish constitutional provision guaranteed access to information as well, although this was not made explicit in the Irish constitution.

This line of reasoning however is incongruent to some responses from that country. Some of the respondents believed the country does not have any constitutional provision guaranteeing access to information.¹⁶⁶ Since the constitution is older than the treaties discussed above, some of which Ireland have signed, these respondents may not have been privy to the tie between free expression and access to information. Another reason for this might result from the lack of case law invoking this provision in association with access to information in that country.

¹⁶⁴ Malawi Government *Constitution*.

¹⁶⁵ Ireland Government *Constitution*.

¹⁶⁶ Personal interview with IRE/4, 16/12/04; Personal interview with IRE/5, 16/12/04.

However, a criticism has been levelled against section 40.6.1° guaranteeing freedom of expression in Ireland. The critics argue that the guarantee falls below the minimum principles on freedom of expression as set forth in the international treaties the country has ratified, especially the ICCPR. These critics suggest that this section should advance the minimum principles expressed by these treaties.¹⁶⁷ Henceforth, if amendments are made to it, this provision could read much along the lines of the ICCPR or the ECHR or even opt for a more concise approach exemplified by newer democracies as in the case of South Africa.

An interesting development is being witnessed in Kenya. The country is not one of the case study countries but might be indicative of what some of them might go through. In 2005 Kenya released a revised constitution for referendum.¹⁶⁸ Unlike in the previous constitution of 1969, this one has somewhat followed the South African model by proposing to guarantee freedom of expression as a separate right while implying access to information in it. It is also proposing to have a separate section on access to information. It still remains to be seen what the outcome of the referendum will be and the impact this development will have on other older constitutions. An inference that can be made from this development is that countries seeking to improve further their democratic setup are bent on emulating Sweden, a country noted as most democratic. Sweden through Article 1 (1) and (2) of its constitution adopted in 1975, guaranteed access to information as a facilitator of free expression and as right in itself.¹⁶⁹ This approach seems to have influenced the constitutions of Malawi in 1994 and South Africa in 1996 and now Kenya in 2005. The Swedish protection of these guarantees in the constitution could now be a model with which countries are content and would want to emulate.

¹⁶⁷ Article 19 'Submission on Ireland's second periodic report to the Human Rights Committee-focus on freedom of expression in Ireland, July 2000. Email attachment from C Pickering to author, 10/05/05.

¹⁶⁸ Kenya Government 'The proposed new constitution of Kenya.' Available at <http://www.kenyaconstitution.org/docs/THE%20PROPOSED%20NEW%20CONSTITUTION%202-08-05_Ab.pdf>. Accessed 02/09/05.

¹⁶⁹ Sweden Government *Constitution of Sweden*. Available at <<http://www.oefre.unibe.ch/law/icl/sw00000.html>>. Accessed 28/09/05.

Governments which have acceded to the treaties on freedom of expression agreed to two things. They were taking on the responsibility to ensure that citizens, over whom they rule, will be able to express themselves freely, in a bid to integrate them into the governance process. Taking on board this responsibility is an acknowledgement that freedom of expression does not take place in a vacuum. It is triggered and guided by access to information. Therefore, acceptance of freedom of expression is a further acceptance of freedom of access to information.

Since freedom of expression and access to information share a relationship, the ability of an individual or group in expressing themselves depends on access to information. It is through access that they are able to formulate ideas and opinions and become better placed to impart them. The above discussion is not intended to suggest that access to information or freedom of expression are undertakings to be enjoyed by citizens alone. Governments also derive tremendous benefits from this relationship. On the one hand, government benefits from access to information as it transacts the mandate to govern bestowed on it by the people. In so doing, it creates and relies on information and uses the same information to interact with the electorate. On the other hand, through freedom of expression, citizens share information with government (and each other) which is crucial to continued response to the needs and aspirations of the people. Through both, public servants are able to account internally to government. Government is also able to account to parliament and to the citizens.

4.4 The roles played by access to information

Access to information plays an array of roles in government. Four of these roles are: ensuring the development and the delivery of informed consent by citizens to government, and the participation of citizens in governance, both processes which are central to effective democracy; the capacity of access to information to reduce and contain information asymmetries that exist between government and the people it governs on behalf; the capability of access to information to manage state secrecy; and lastly the capacity of access to information to promote and protect personal privacy. The combined effect of these roles results in a governance process which is legitimate in that citizens have consented to it, one which has near perfect information

reflected by reduced and contained information asymmetries, where growth in state secrecy is reversed and where personal privacy is protected by an effective access to information framework.

4.4.1 The importance of access to information to the democratic process

Most societal processes not only rely on the availability of information but also on the capacity of citizens to access and utilise it. In modern times, access to information is associated with democratic governance which is open and accountable. Democracy is built on the evocation that members of the public can provide informed consent to governance only when they have comprehensive access to information. Armed with information, members of the public are better placed to fully engage in the democratic process and further help shape its outlook.¹⁷⁰ Nevitte adds that through access to information:

citizens are better able to make reasoned choices about the political world. They are also better equipped both to mount and evaluate reasoned arguments. Interest is important as a necessary condition – it is interest that supplies the motivation for citizens to go out and acquire information. Disinterested citizens are less likely than others to be informed. Finally, engagement entails forms of citizen behaviour, such as voting, that...usually signifies expressions of regime support and acceptance of the legitimacy of the political order.¹⁷¹

In as much as access to information is a necessary prerequisite for democracy, it is founded on the possible existence of interest which culminates in access being facilitated and possibly granted. It is this interest which motivates an individual or groups of individuals to seek and gain access to information. Any absence of interest or failure to show it, is an indicator that access may not be necessary. Lack of interest may be an indication that citizens are already informed and do not need additional access or it may mean that access to them is not necessary for various reasons.

¹⁷⁰ N Nevitte 'Citizens' values, information and democratic life' in Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians* (Ottawa: Access to Information Review Task Force, 2002). Available at <<http://www.atirtf-geai.gc.ca/paper-citizen-e.html>>. Accessed 01/05/05.

¹⁷¹ N Nevitte 'Citizens' values, information and democratic life.'

It should be borne in mind that interest is something relative and evolves and changes with time. A person not interested in gaining access to a certain body of information may feel differently after some time. Socio-economic and political factors prevailing at any given point in time influence the development, or not, of the interest. Within society citizens assume complementary roles to one another. An individual may possess interest to access information and use that interest to entice those who did not have it, to develop it and eventually undertake the access. Interest to access information is also fluid. At times the interest will exist but the prevailing political set-up may deny access. At other times, the interest may not be present, whether or not access is possible. Interest and subsequent access to a body of information can result in the emergence of interest to access a different body of information. Access to information takes root only when there is interest which motivates seeking and gaining of access. Within society interest for access is always there. It may be absent in one individual but will exist in another. What matters is the size of the interest shown, its quality and its application. However, the variable existence of interest suggests that there is need for a defined infrastructure to cater for the varied access to information requests as and when they are made.

The democratic process requires greater participation of citizens and their dedication in governance. This is possible through awareness of the workings of government which citizens will only gain through access to information. Access to information encourages greater transparency of government leading to responsible public administration and better responsiveness to the needs of the electorate. Access to information is a deterrent to corruption and facilitates improvements in the decision-making process of government. Roberts opines that access to information is “essential for persons to realize their basic right to participate in the governing of their country and live under a system built on informed consent of the citizenry.”¹⁷² He goes on:

Similarly, access to information about decisions regarding the conferral or withholding of other benefits by government institutions, or regulatory or policing decisions, reduces the probability that such decisions will be taken for improper

¹⁷² A Roberts ‘Access to government information: an overview of issues’ in L Neuman (ed.) *Access to information: a key to democracy* (Atlanta, GA: The Carter Centre, 2002): 9. Available at <<http://www.cartercenter.org/documents/1272.pdf>>. Accessed 10/03/05.

reasons...Access to information about the formulation of policy can reveal instances in which policy decisions were taken without careful consideration, and instances in which decisions contradicted advice provided by professionals within the public service.¹⁷³

Quintessentially, access to information enables citizens to know their government's plans, policies, programmes and so on, through information from its various institutions.¹⁷⁴ It allows them to know, understand and appreciate government programmes and services, their strengths and weaknesses. Access to information also makes governments capable of proclaiming "we have to be accountable; we have to demonstrate good practice; we have to be able to show why we did things the way we did, we have to be able to explain how public funds have been expended."¹⁷⁵ Once access to information has been realised only then can citizens offer informed consent for government. Access enables them to assess probable risks of selecting certain politicians and to have weighed these against anticipated benefits. Access thus enables citizens to develop the capacity of arriving at informed consent and the ability of offering it and subjecting it to checks and balances.

4.4.2 The capacity of access to information in addressing problems of information asymmetry

Governance and the relationship which government has with the electorate is riddled with imperfect information. That is, government and the people it governs on behalf of, have inequitable access to information. As a result, information asymmetries develop between these two players of governance, with government having greater access to information than the public.

Information asymmetry is a term associated with the field of economics, especially with what is known as economics of information. The term, 'information asymmetry,' took centre stage in the writings of Joseph Stiglitz who along with George Akerlof and Michael Spence received the 2001 Nobel Prize for their exploratory work on the topic.¹⁷⁶

¹⁷³ A Roberts 'Access to government information:' 9.

¹⁷⁴ Personal interview with UK/10, 10/04/04.

¹⁷⁵ Personal interview with UK/11, 30/04/04.

¹⁷⁶ See for instance: J Stiglitz: 'Transparency in government:' 27-29.

Information asymmetry refers to an environment where there is information disparity between those that govern and the governed leading to flawed agency relationships. In lay terms, information asymmetry refers to a situation in which relevant information is known to some but not to all parties involved in a transaction. In terms of government-public relationships, information asymmetry indicates that those who have been mandated to govern have greater access to information on policies, programmes and services that are meant to satisfy the needs of the public, while the public themselves have limited access to this information.¹⁷⁷ Where such asymmetries exist, imperfect information results, thus denying the public full knowledge of how government responds to their needs and how decisions affecting them are arrived at. When members of the public are uncertain or do not fully comprehend government policies, programmes and services, they gain access to the information on them to reduce the uncertainty. This uncertainty is what economists call 'risk' in that members of the public are at risk of not fully utilising government programmes and services because they do not sufficiently comprehend their due benefits. Through access to the same sources of information that the government enjoys and its subsequent use, members of the public are better placed to reduce the risks which limited access brings about.¹⁷⁸

The need to reduce the levels of information asymmetry between government and citizens arises from the reasoning that information which government holds and uses is harnessed through taxes or grants and loans taken on behalf of the public. Given that it is the public who pay for the collection of the information, its maintenance over time and use, the assumption is it is they who own it and government is just its custodian on their behalf.¹⁷⁹ Government is the custodian because it has been mandated to serve the people, hence attends to their interests and will. As a result, it is anticipated that government will adequately look after the information it uses as it serves the people and will further enable them to have access to it.

¹⁷⁷ J Stiglitz 'Transparency in government': 27-28.

¹⁷⁸ B R Kingma *The economics of information, a guide to the economic and cost-benefit analysis for information professionals* 2nd edn. (Englewood, CO: Libraries Unlimited, 2001):89.

¹⁷⁹ This viewpoint is advanced by most respondents in all the case countries.

Invariably, government-held information is a public good like all other public goods. Unlike other public goods, government-held information is a non-rival good which members of the public should be able to consume without too much restriction.¹⁸⁰ Information is thus a public commodity which records how a government works on behalf of the electorate who brought it to power. Access to that information by the public is on the one hand, a guarantee that their funds are put to wise use and on the other, an assurance of government's capacity in accounting for the various activities it is engaged in. Access to information can also build trust of citizens in the government in that they tend to appreciate that what is being done in their name is done in the open.¹⁸¹ If governments were to acknowledge that information asymmetries exist and that there is a need to reduce them, this would be read by the electorate as an attempt at making the governance process more transparent and less secretive.

Many methods exist in which information asymmetry between government and the citizens can be reduced. The media, both state owned and private, informs the public about government programmes and services. Politicians do the same and parliament, through its various committees and question-answer sessions, provide information which can help to reduce the asymmetries. The problem with this arrangement is that government determines the information which it feels the public need access to. This *modus operandi*, as the next chapter shows, has its own flaws. Where government alone is left to decide the coverage of information, and when to release it, the asymmetries do not disappear. When measures are adopted to decrease the asymmetries, members of the public should have the opportunity of deciding which information they want to access, and to determine when they would want to do so rather than government determining this need single-handedly.

Access to information is important towards reducing information asymmetries. Imperfect information results from the absence of a *modus operandi* which realises the value of access to information and seeks to level its access between government and citizens. The need to reduce information asymmetries by governments coincides with the expectations raised by the treaties discussed earlier. Specifically, access to

¹⁸⁰ J Stiglitz 'Transparency in government': 28.

¹⁸¹ Personal interview with UK/12, 18/05/04.

information or even the capability of citizens in expressing themselves freely, do not rely solely on government being the determiner of information to be released and when. Where this exists, government will release only the information depicting it in a good light while the rest will be withheld. This practice retains or increases the asymmetries and limits free expression to what government wants the people to know. The reduction of the asymmetries is achieved by buttressing government's practice of proactive disclosure of information with the ability of citizens to gain access to the information they require which government may not have made available to them. The capacities of access to information in reducing information asymmetries will only be really effective once FOI legislation has been enacted, and enabled by effective records management.

4.4.3 The capacity of access to information in addressing problems of state secrecy

The importance of access to information partly arises from the need to counteract and contain state secrecy. Stiglitz argued that secrecy in government provides it with some insulation against being blamed for mistakes and other failures.¹⁸² Secretive governments often impose restrictions on access to information thereby rendering themselves non-transparent in their operations. Hubbard argued that secrecy "creates an artificial scarcity of information; by its definition a secret is a piece of asymmetric information."¹⁸³ In being secretive, governments contribute to information asymmetries in that they have unlimited access to information while they release into the public domain very little information. Secrecy thus exacerbates corruption in that a government mostly responds to its own needs rather than to those of the public. Government through civil servants can create secrets which are beneficial to itself than to the entire public.¹⁸⁴ Neuman noted:

The consequences of corruption globally have been clear: unequal access to public services and justice, reduced investor confidence, continued poverty, and even violence and overthrow of governments.

¹⁸² J Stiglitz: 'Transparency in government:' 34.

¹⁸³ P Hubbard 'Freedom of information and security intelligence: an economic analysis in an Australian context' *Open Government: a journal on Freedom of Information* 1:3 (2005):4-21. Available at <<http://www.opengovjournal.org/>>. Accessed 08/02/06.

¹⁸⁴ J Stiglitz 'Transparency in government:' 34-35.

A high level of corruption is a singularly pernicious societal problem that also undermines the rule of law and citizen confidence in democratic institutions.¹⁸⁵

Access to information is crucial to fighting corruption and is key to enabling members of the public know, understand and exercise the rights government has set aside for them.¹⁸⁶ Access to information provides an incentive to the democratic governance process in that whatever government does is subject to public scrutiny.¹⁸⁷ The recognition of the importance of access to information by governments denotes a move away from a culture of secrecy to openness and transparency.¹⁸⁸ Secrecy which results from restricted information restricts public participation in the decision-making process of government and further hobbles their ability to participate meaningfully in the entire democratic process.

Effective attempts at reducing government secrecy will be attainable if a two-pronged approach is adopted. The first approach is for government to acknowledge that it is under obligation to inform the public. In line with the acknowledgement, government will undertake to provide citizens with access to information. Secondly, citizens have to be conscious of the fact that government is there to serve their needs, having given it the mandate to rule on their behalf. Therefore, citizens must be in a position to demand access to the information that the government holds. This combined effort of having government carry out its obligation of informing citizens and they in turn understanding that they can request access to information can help reduce state secrecy. This combined effort in accessing information has potential through FOI legislation.

Access to information has the capacity to address the problems brought about by state secrecy. Through access, improved transparency is achieved as well as effective accountability. It is worth noting that state secrecy cannot be contained

¹⁸⁵ L Neuman 'Introduction' in L Neuman (ed.) *Access to information*: 5.

¹⁸⁶ Email communication with CAN/1, 05/01/05.

¹⁸⁷ Personal interview with UK/8, 23/04/04.

¹⁸⁸ L Millar 'The right to information-the right to records: the relationship between records keeping, access to information, and government accountability' (New Delhi: Commonwealth Human Rights Initiative, 2003): 1. Available at http://www.humanrightsinitiative.org/programs/ai/rti/articles/record_keeping_ai.pdf. Accessed 05/04/05.

through accessing information which government feels citizens ought to know because government can select and make available only information which hides its misdeeds. Access to information, which partly arises from government's obligation of informing citizens, combined with the capability of citizens in gaining direct access to information, is an effective way of containing state secrecy.

4.4.4 The capacity of access to information in promoting and protecting personal privacy

Even though access to information is invaluable to the democratic process and has capacities to reverse information asymmetries and to contain state secrecy, compelling obligations exist for the protection of personal information. While the international and regional treaties discussed in section 4.2 promote access to information, they also compel the protection of personal information. This section is not in any way an attempt at interrogating access to information within the scope of personal privacy or protection of access to personal information. To undertake this task would demand a similar study in terms of intensity to the one which this thesis discusses.

However, in as much as access to information is being encouraged, care should be undertaken to protect personal information from undue access by persons other than those who are subjects of it. Clarke contended that individual citizens believe that information which is personal to them and is held by government should not be accessed by other individuals other than themselves.¹⁸⁹ Hence, when governments seek to promote access to information, they should endeavour to protect personal information. That is, when access to information is encouraged and personal information protected, the individuals who are subjects of the particular information should be allowed access to it so as to verify it. At times, compelling reasons may arise which could lead to intrusions into the privacy of individuals through making their information accessible to other people. When this occurs, the validity to intrude

¹⁸⁹ R Clarke 'Internet privacy concerns confirm the case for intervention' *Communication of the ACM* 42:2 (1999): 60-67. Available at <<http://delivery.acm.org/10.1145/300000/293475/p60-clarke.pdf?key1=293475&key2=2788236511&coll=ACM&dl=ACM&CFID=11111111&CFTOKEN=22222222>>. Accessed 12/04/06.

and compromise personal privacy through allowing access to personal information to others than the subjects of it should have been well thought out.

Hazell opined that access to information and the need to protect the privacy of citizens relate because the third party personal information exemption is widely used to deny citizens to gain access to information. Unless access to information and protection of privacy laws strike a careful balance “there is a risk that privacy may be used to withhold information of legitimate concern to the public.”¹⁹⁰ When governments make considerations to enhance the capacities of citizens in gaining access to information they need to do the same for protecting access to private information. Access to information and protection of privacy are two sides of the same coin. They are not set to outwit the other but are equal in terms of value and importance to citizens. It is therefore important that a balance between the two should always be found and reviewed time to time since access to information just like privacy is not static. It changes with time and is influenced by many things including the social status of a person. The higher a person is in social standing, the less privacy they are likely to enjoy.

4.5 Constitutional protection of access to information

Consequent to the roles discussed above, access to information deserves constitutional underpinning. Guaranteeing public access to information through a clause in a constitution is an indication that information is an important exploit which government acknowledges and sets aside for the public to benefit from. It also signifies that access to information is paramount and therefore government pledges for its existence. This pledge is a sign that access to information cannot be guaranteed just by a declaration made by word of mouth but needs to be captured in such a way that government is under some form of contract to establish it. The best contract compelling government to provide access to information is the constitution. By being elected into power, the party that forms the government pledges to the electorate that it will be guided by the constitution and will abide by it as it runs public affairs. If

¹⁹⁰ R Hazell ‘Balancing privacy and freedom of information: policy options in the United Kingdom’ in A McDonald and G Terrill (eds.) *Open government: freedom of information and privacy*: 69.

access to information is provided for in a constitution, government undertakes to carry the pledge through by facilitating its functioning.

4.5.1 Underlying reasons for constitutional protection

A constitution is a supreme law of a country and everything captured in it is a reflection of its importance to a particular country. A constitution is a:

law that contains the most important rules of law in connection with the constitutional system of a country. These include the rules of law dealing with the state, the government bodies of the country, their powers and how they must exercise those powers...a constitution defines government authority, confers it on particular government institutions, and regulates and limits its exercise.¹⁹¹

A constitution legitimises government and the governance approach it adopts, as well as sets out government institutions and their powers. It is a blueprint that captures guiding principles which a government intends to adhere to when serving and representing the public. It also captures the rights and obligations of both government and the public to one another. Doolan stressed that a constitution is a “system of laws, customs and conventions which create and validate the organs of government and which regulate the interaction of those organs with one another and with the individual. Most of these rules are legal in the sense that courts of law will recognise and apply them where appropriate.”¹⁹² A constitution therefore, sets parameters guiding the execution of governmental power and acts as a benchmark and premise for all other laws of a country. A constitution is thus a law, but unlike other laws, has a much higher status within a country’s legislative system.¹⁹³

Two forms of constitutions exist. These are codified and uncoded constitutions. Codified constitutions are in the form of a single written law which sets out the governance structure inclusive of the rights and obligations. They are coherent and act as a contract which government promises to abide by as it governs on behalf of the people. Uncoded constitutions do not have any of the written sources or

¹⁹¹ I M Rautenbach and E F J Malherbe *Constitutional Law* 3rd edn. (Johannesburg: Butterworth, 1999): 23.

¹⁹² B Doolan *Constitutional law and constitutional rights in Ireland* 3rd edn. (Dublin: Gill and Macmillan, 1994): 1.

¹⁹³ I M Rautenbach and E F J Malherbe *Constitutional Law*: 25.

premises associated with the codified one.¹⁹⁴ This suggests that a codified constitution is something that is always written and captured in documentary form with a title like 'constitution of the Republic of...' All the case study countries excluding the UK have codified constitutions. The UK does not have a single document which can be termed a constitution. Although its constitution is unwritten, the UK regulates its constitutional affairs through legislation supported by sovereignty of parliament, royal prerogatives and precedents.¹⁹⁵

Codified constitutions are not elaborate. They are made up of principles, conventions, customs, professing the intention and pledges of government in carrying out public functions and these are set in generalities. Elaborating the provisions within the constitution would mean the document would be voluminous and laborious to read and invoke. Instead, constitutions rely on specific statutes to clarify and put into operation each of their provisions. However, the advantage of codified constitutions as against those uncoded is that they are clear on what they actually contain because everything in them is written. They are also clear on the rights and freedom that citizens are to enjoy since they mostly have a comprehensive Bill of Rights. Lastly, codified constitutions have agreed mechanisms which are followed if there is a need to amend any of their sections, a prerogative missing from those which are not codified.¹⁹⁶

4.5.2 Purpose of a constitution

A codified constitution serves four main purposes.¹⁹⁷ It may emancipate a country from colonial rule or from a regime which was authoritarian; it establishes a system of government a country follows; it protects human rights and freedoms, and it imposes sanctions on the exercise of government power.

¹⁹⁴ C Pilkington *The politics today: companion to the British constitution* (Manchester: Manchester University Press, 1999): 1-3.

¹⁹⁵ I M Rautenbach and E F J Malherbe *Constitutional Law*: 38.

¹⁹⁶ J E Lane *Constitutions and political theory* (Manchester: Manchester University Press, 1996): 1, chapter 8-9.

¹⁹⁷ E M Barendt *An introduction to constitutional law* (Oxford: Oxford University Press, 1998): 2-3

First, a codified constitution can help emancipate a country from colonial rule. Once citizens and the political process allow for it, countries adopt constitutions to formalise their emancipation. This is particularly true for four of the case study countries, Botswana, Malawi, South Africa and Ireland, which were at one time dependents of the UK. The constitutions of Botswana (1966), Malawi (1961), the Republic of Ireland (1937) and South Africa (1909) ended colonial rule and established each country as a sovereign state.

Emancipation also extends beyond colonial rule. Later in their development, some of the case study countries were compelled to re-draft and adopt new constitutions to supersede the older ones. Two case study countries, Malawi and South Africa through their constitutions of 1994 and 1996 respectively, were emancipated from autocratic and one party rule (Malawi) and apartheid (South Africa). The 1961 constitution of Malawi was used by Dr. Hastings Kamuzu Banda to propagate authoritarianism. The constitution adopted in 1994 put an end to the autocracy.¹⁹⁸ Apartheid was legally encouraged in South Africa through the constitution of 1909 which ushered in an era of racial segregation with the minority Afrikaner population forming the government and establishing themselves as the 'better race' while the majority Black population lived in squalor and poverty, and had no say in how the country was governed. The coming into force of the constitution of 1996 formally dissolved apartheid and replaced it with democratic governance which recognised racial equality among other things.¹⁹⁹

Second, constitutions establish systems of governance. The 1961 constitution of Malawi established an authoritarian government. That of South Africa in 1909 encouraged the creation of apartheid as a system of governance. Constitutions that were later introduced in both countries formally renounced and replaced the previous governance systems with democracy. The constitutions of both Botswana and the Republic of Ireland also served to introduce and sustain democratic governance.

¹⁹⁸ D Cammack *Poorly performing countries: Malawi, 1980-2002* (London: Overseas Development Institute, 2004): 8-9; and 63-88 for annex 2: significant political events of Malawi. Available at <<http://www.future-agricultures.org/pdf%20files/PoorPerformancereport.pdf>>. Accessed 21/08/06.

¹⁹⁹ See section 4.3.

The third purpose of constitutions is to protect individual rights and freedoms. As explained earlier, some of the case study countries have signed and ratified certain international covenants on rights and freedom of individuals, including the UDHR and the ICCPR.²⁰⁰ Some of these covenants obliged signatories to make legal pledges towards fulfilling rights and freedoms which citizens are meant to enjoy. Freedom of expression and access to information are some of the rights and freedoms singled out for protection. Protecting these rights through constitutional provisions is a guarantee that members of the public can gain access to information, including that held by government, and are free to express themselves. It is further a guarantee that government is committed to providing the public with access or with an environment conducive to free expression. Since constitutions are not elaborate in their provisions, where they guarantee and protect access to information they will not go into detail as to which information access is being guaranteed, the mechanisms guiding the access and all other constituent elements of access. Rather, all they do is to show government's obligation and pledge in enabling citizens to gain access to information.

Last, a constitution imposes parameters within which government power is exercised. A constitution thus legitimises what a government can and cannot do. The 1961 Malawi constitution was invoked to make presidential decrees the norm. It was within Banda's power to decide what government did and how to do it. In 1994 when a new constitution was adopted, which clearly defined what government can and cannot do, a new era of democracy began. This constitution came in to regulate government power better than the old one. Where government goes beyond the power the constitution ascribes to it, its actions are considered null and void. In relation to this, a constitution also imposes sanctions on the enjoyment of the rights it guarantees. Therefore, access to information, as one of the rights a constitution may protect, is not absolute. The right is practicable subject to the precincts the constitution imposes.

It is as a result of these four purposes of a constitution that countries are able to declare themselves as sovereign and to be recognised so by others. Sovereignty, supported by legitimising governance and drawing of boundaries within which a government exercises its powers, is an indication that it is committed to working and

²⁰⁰ See section 4.3.

operating within the framework and guidance of the constitution. By virtue of having a constitution countries bind themselves to the principles and ideals the constitutions spell out.²⁰¹

Some countries, fearing to be seen as disregarding the above purposes of a constitution, have gone to the extent of suspending their constitutions and opting to govern without any. One such country is Swaziland which suspended its constitution in 1973. The suspension resulted from an understanding by the Swazi monarchy that the constitution was undermining its hegemony through limiting its exercise of power.²⁰² At the time of its suspension King Sobuza II is reported as having said:

The constitution has permitted into our country highly undesirable political practices alien to, and incompatible with the way of life of our society and designed to disrupt and destroy our peaceful and constructive and essentially democratic methods of political activity; increasingly this engenders hostility, bitterness and unrest in our peaceful society.²⁰³

He then went on to declare:

I, Sobuza II King of Swaziland, hereby declare that, in collaboration with my cabinet ministers and support by the whole nation, I have supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself.²⁰⁴

The suspension of the codified constitution meant the monarchy had all power of governance and used it in whatever way it found fit. This example of Swaziland shows that governments can overturn constitutions when it suits those who are in power. Thus, the success of a codified constitution lies not in just its wording but also on the existence of political will to abide by it and to ensure furtherance of its objectives.

²⁰¹ C F Rostbøll *Human rights, popular sovereignty and freedom: a study of the basic norms of the constitutional and democratic welfare-state* (Copenhagen: Copenhagen Political Studies Press, 1998): 116.

²⁰² K Matlosa 'Democracy and conflict in post-apartheid South Africa: dilemmas of social change in small states' *International Affairs* 74:2 (1998): 319-337. Available at <http://www.ingentaconnect.com/content/bpl/inta/1998/00000074/00000002/art00019>>. Accessed 10/05/05.

²⁰³ Sustainable Democracy *Democracy fact file: Swaziland* (Harare: Southern Africa Research and Documentation Centre, 1999). Available at <http://www.sardc.net/SD/factfiles/swaziland.pdf>. Accessed 10/05/05.

²⁰⁴ Sustainable Democracy *Democracy fact file: Swaziland*

4.5.3 How constitutions achieve their purpose

Constitutions possess three qualities that give them their importance and prominence. Firstly, as explained in section 4.5.1, a constitution is a supreme law of a country. Secondly, provisions of a constitution are enforceable through the courts and lastly, a constitution is not amended like any other law of a country.²⁰⁵

All the case study countries with codified constitutions have a clause setting out the supremacy. For example, section 5 of the constitution of Malawi says: “Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.”²⁰⁶ By virtue of these clauses, all laws that a country enacts are expected to comply with the standards and principles enshrined in the constitution. Those which do not are declared invalid when cases against them are argued in the courts of law. Constitutions thus provide a benchmark upon which other statutes of a country are based. Statutes which a country adopts must not fall below the standards set by the constitution rather the statutes need to be at par or above the standards set.²⁰⁷

The second quality is that constitutions are enforceable through the courts.²⁰⁸ Where conflicts relating to interpreting and understanding of constitutional provisions arise, they are resolved by the courts. Taking the constitution of Malawi again as an example: section 9 states “The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.”²⁰⁹ In line with this principle one respondent suggests “a constitution is a living document and courts must breathe life into it and interpret it generously, in a more generous fashion so that it takes into account the ever changing values of a society.”²¹⁰ Constitutions of Botswana, South Africa and the Republic of Ireland all have similar provisions.

²⁰⁵ For an elaborate discussion on these constitutional qualities see I M Rautenbach and E F J Malherbe *Constitutional Law*:24-25

²⁰⁶ Malawi Government *Constitution*.

²⁰⁷ See section 4.5.1.

²⁰⁸ I M Rautenbach and E F J Malherbe *Constitutional Law*: 24-25.

²⁰⁹ Malawi Government *Constitution: Section 9*.

²¹⁰ Interview with BW/4, 02/08/04.

Thirdly, constitutions are not amended like any other law. All the written constitutions of countries used in this study have clauses which explain the procedures that are to be followed if the constitution needs to be altered. An example is contained in sections 89 and 94 of the constitution of Botswana which states that a constitution can only be amended where a bill of such intention has been published in the government gazette for at least 30 days before discussions on the intent can be brought before parliament. After the bill is deliberated in parliament it should be followed by voting and the changes will be effected only if a minimum of two-thirds majority were in favour of the amendment. Also, an amendment to the constitution might be considered following a national referendum whose results are in favour of the amendment.²¹¹

It is through a combination of these three qualities that constitutions are able to meet the purposes for which they are intended. Thus, where constitutions guarantee access to information, it means this right is regarded as supreme to the functioning of government and as essential to citizens. Where legal conflicts arise out of defining and determining the information that has to be accessed, adjudication is sought from the courts. Most constitutions afford the courts a high level of autonomy which prevents the Executive branch of government from influencing the decisions they arrive at. It is thus assumed that courts will be impartial when deliberating and passing judgement on cases stemming from access to information. Since constitutions are not subjected to amendments like other statutes, constitutional guarantees on access to information can not be amended at the will of government. If for any reason they have to be amended, all the procedures which the constitution has set aside for its alteration have to be followed. This provides an assurance that constitutional guarantees on access to information remain supreme through the constitutions which protect them.

²¹¹ Botswana Government *Constitution*.

4.6 *Constitutional guarantees on access to information*

According to Mueller, a right guaranteed by a constitution refers to “an unconditional freedom of an individual to undertake a particular action or to refrain from such an action without interference or coercion from other individuals or institutions.”²¹² Rights are never unconditional hence, they are not absolute. Any right that is conferred on citizens through a constitution will have a provision setting limits on it. Guaranteeing access to information through a constitutional provision is not an indication or suggestion that members of the public can access all government information. It is a pledge that citizens can and will gain access to government-held information subject to the limitations the constitution spells out. The reason for this is that the constitution protects the rights from abuse. Limiting the rights to certain parameters is an indication that a constitution acknowledges that citizens have an array of rights to which it has to provide guarantees. Through restricting their enjoyment, a constitution ensures that the many rights it protects do not clash with one another or frustrate the efforts the other intends to achieve.²¹³

Mueller also observed that constitutional “rights are a *means* to the more basic end of advancing the interests of all members of the community. They are not an end in themselves.”²¹⁴ This observation is very true. Originating from this is that if access to information as a constitutional right is to be taken as an end in itself, its application will be problematic. The initial problems will arise from the need to establish the context and content of the right. To do this will mean that the information to which the access is being provided has to be spelt out. There will also be a need to state the context within which the right will be applicable. These finer details of access to information as a constitutional right cannot be explained within the confines of a constitution. Constitutional guarantees, as already stated, are pledges which government promises to abide by.²¹⁵ However, a pledge remains theoretical until it is turned into something practicable which citizens can use. If the pledge to access information is not defined and guidance to its operation provided, it becomes open to abuse.

²¹² D C Mueller: *Constitutional democracy* (Oxford: Oxford University Press, 1996): 212.

²¹³ See section 4.5.2.

²¹⁴ DC Mueller *Constitutional democracy* : 213.

²¹⁵ See section 4.5.1.

By determining the information it feels citizens need access to and timing when this can take place, government is not carrying out fully the pledges of providing access as per the guarantee. The reason is that constitutions guarantee access to information without specifying what ought to be done to turn it to fruition. To clarify the scope and application of access demands an enactment of a specific law.

4.6.1 The importance of the constitutional guarantees on access to information

To guarantee access to information through a clause in the constitution is recognition of the significance the right has for citizens and for government. The constitutional provision:

...elevates the importance of the matter from being a routine measure of governance to being a matter of concern to a fundamental rule of the state and the constitution is the most significant and important document. It is the founding document of state power and ...of course to have it there accords a huge significance to an issue than not have it there...²¹⁶

By underpinning access through constitutions, governments are accepting that information is an integral element of governance. The importance of its access is fundamental and its legislation which lacks constitutional grounding will be symbol without substance. The law is symbolic of the need to implement and regulate access to information but will lack the fervour which makes access fundamental to both government and citizens. Walter Keim of Torshaugv in Germany sent two petitions to the German Parliament Bundestag in 2005 requesting it to consider giving the German FOI legislation constitutional underpinning.²¹⁷ This request by Keim is premised on his belief that access to information laws are bound to perform better under the guidance of constitutional provisions.

²¹⁶ Personal interview with UK/15, 01/06/04.

²¹⁷ W Keim 'Constitutional Complaint Freedom of Information 1 BvR 1981/05' (18 August 2005). Available at <<http://home.online.no/~wkeim/files/verfassungsbeschwerde-en.htm>>. Accessed 17/07/06. see also W Keim 'Petition 4-15-07-1030-037433: Access to Public Information as Constitutional Right' (31 August 2005). Available at <http://home.online.no/~wkeim/petition_if-en.htm>. Accessed 17/07/06.

It can further be argued that constitutional protection of access to information is in itself a symbol without substance. That is, it is symbolic to have access to information protected through a constitutional provision. However, it will lack substance towards its implementation if a specific law facilitating it has not been adopted. The guarantee is set in a broad stylistic formulation and implementing it as is, without any other legal guidance, will prove difficult. The pledges which government makes through constitutions need some form of impetus for them to have substance.

Access to information gains its substance as a fundamental right from the importance accorded to a constitution. Recalling that constitutions have three qualities viz: they are supreme, they are enforceable through the courts and have to undergo prescribed procedures for their amendment, constitutional guarantees on access to information are therefore, supreme; are enforceable through the courts and will only be amended following laid down procedures for amending the constitution.²¹⁸ Thus access to information as a right is a symbol which accrues its substance from the significance accorded to the constitution.

This suggests also that laws which implement access to information but are not premised on relevant constitutional provisions are weaker in terms of authority compared to those which have this benefit. The reason is that access to information laws which lack constitutional protection cannot be regarded as supreme in the way that those with it are. Also, when the courts have to adjudicate on cases involving access laws lacking constitutional grounding, they will do so without any reference to a specific constitutional section. Further their amendments can be arbitrary when compared to those grounded on constitutional guarantees.

²¹⁸ See section 4.5.3.

A question that arises from the above discussion is: what is significant about government information that it warrants access to it to be protected by a constitutional provision? Government holds vast bodies of information.

The information kept by government holds the memory of the nation and provides a full portrait of its activities, performance and future plans. Government information includes: international accords; negotiating briefs; policy statements; minutes of discussions with investors, donors and debtors; cabinet deliberations and decisions; parliamentary papers; judicial proceedings; details of government functioning and structure; intra-governmental memos; executive orders; budget estimates and accounts; evaluations of public expenditure; expert advice; recommendations and guidelines; transcripts of departmental meetings; statistical data; reports of task forces, commissions and working groups; social surveys and analyses of health, education and food availability; assessments of demographic and employment trends; analysis of defence preparedness and purchases; maps; studies on natural resource locations and availability; proof of quality of the environment, water and air pollution; detailed personal records...²¹⁹

According to Bovens, government has four types of obligations regarding citizens' rights:²²⁰ They are:

- An obligation to respect the rights and freedoms of members of the public and undertake not to violate them;

This is an undertaking that government is committed to ensuring enjoyment of the right so concerned. For instance, government cannot commit itself to the provision of access to information without capturing this commitment on some legal platform, the constitution.

- An obligation to give substance to the rights and freedoms;

As argued earlier, constitutional rights are symbols in the form of pledges and are in need of substance.²²¹ Once a right is protected in the constitution, it indicates that government is committed in one way or the other in fulfilling the objectives set out in the right. Where constitutions protect and guarantee access to

²¹⁹ M Daruwala (ed.) *Open sesame-looking for the right to information in the Commonwealth* (New Delhi: Commonwealth Human Rights Initiative, 2003):10.

²²⁰ M Bovens 'Information rights: citizens in the information society' *Journal of Political Philosophy* 10:3 (2002):317-341. Available at <http://www.ingentaconnect.com/content/bpl/jopp/2002/00000010/00000003/art00005>. Accessed 01/05/05.

²²¹ See section 4.5.1.

information, it indicates a government's obligation in setting out modalities towards enabling citizens to gain access to information.

- An obligation to protect the rights and freedoms;

Once the rights are constitutionally protected, this marks government commitment to protect them. Guaranteeing access to information through the constitution shows that government is seeking to protect and preserve the ability of citizens in accessing government-held information.

- An obligation to promote the rights and obligations.

Protection of rights goes hand in hand with the need to promote them. By being obliged to provide access to information, government is also compelled to promote understanding and use of the right.

What this shows is that access to information as a constitutional right imposes clear obligations on government. Without these obligations, access to information would just remain a symbol protected by the constitution but lacking any firm substance. Essentially, government creates and hold lots of information covering all aspects of public life. Through guaranteeing access to this information, governments are acknowledging that they are governing not for themselves but for the citizens, and that there should be communication between both parties. Through communicating, government-held information finds its way into public domain and government also benefits from the information which citizens have at their disposal.

4.6.2 The practicability of constitutional guarantees on access to information

Constitutional guarantees on access to information are important to both citizens and government. The guarantees are pledges setting out the intentions of government. Regarding access to information, the guarantees spell out government's commitment and obligation in enabling citizens to gain access to government information. Since they lack depth and qualification, constitutional guarantees do not detail the information which can be accessed, how it can be accessed, when it can be accessed and other related issues meant to make access practical.

Guaranteeing access to government information through an article in the constitution, whether explicit as in the case of Malawi and South Africa or implicit as in Botswana and the Ireland is fundamental, but left to operate alone it can lead to problems of interpretation and conceptualising of the paradigms of access. The first problem arising from the constitutional guarantee on access to information emerges from the way they are phrased. Constitutions of Malawi and South Africa explicitly state the public can have access to government information for purposes of fulfilling and protecting rights of an individual. The concern with this is that the provisions do not elaborate which state information the public can have access to, let alone how or where. Constitutional guarantees are simply an expression of an idea. They do not proclaim how facilitation of the access is to be achieved; who is administratively responsible for oversight of access; or mention an alternative system of appeal other than take advantage of the provision that courts can better deal with matters of constitutional interpretation.²²²

The constitution of both Botswana and Republic of Ireland do not explicitly mention that the public can have access to information. What they do is to protect and guarantee freedom of expression, and access to information is implied as an enabler. Where constitutions are not explicit in the intentions of their provisions, such matters can be brought before courts for adjudication. A case in point is *Leander v Sweden* a case brought before the European Court of Human Rights in 1987.²²³ The court held that article 10 of the ECHR on freedom of expression also guaranteed the access to government information. It is likely that if a similar matter is brought before the courts of these case study countries a similar judgement can be reached by borrowing from international case law and experience.

The above, point to the difficulties posed by constitutional guarantees. When constitutions mention that access is guaranteed to state information it is not clear which state information the public can gain access to. Is it information which members of the public can seek or information which governments can provide without citizens requesting it? Even if it is information which members of the public

²²² Personal interview with IRE/1, 14/12/04.

²²³ European Court of Human Rights *Leander V. Sweden*-9248/81 [1987]ECHR 4 (26 March 1987). Available at <<http://www.worldlii.org/eu/cases/ECHR/1987/4.html>>. Accessed 04/03/04.

can seek access to, what would be the types provided? Is it access to documents, verbal response or any other means? Further still, how will access to information be provided? When will it be provided? How is the guarantee going to be enforced? What are the penalties for the infringement of the guarantee? Are there any fees to be paid for the want to gain access? If the fees are there, how are they determined?

Matters of constitutional conflict, be it interpretation, coverage and so on, are normally resolved by the courts. Although this is a noble idea, in that codified constitutions see courts as distinct institutions separate from the legislature and the executive, and as being autonomous, there are some difficulties. One of them is that the courts are not accessible to all citizens, because of the costs involved, not all people can gain access to them. Taking a matter for adjudication in a court is not cheap in that one would need to engage a lawyer and not all people can afford legal fees, thus, a majority of citizens do not have the resources to approach the courts for adjudication. Even those that do, would want the matter to be dealt with expeditiously and this may always not be so. Cases taken to courts undergo various stages. The case is initially registered, a magistrate or a judge is assigned to it before it can begin. Deliberations on the issue brought before it sometimes take days or even months before judgement can be passed. Even where judgement has been passed in favour or against, the opposing party may appeal against the verdict leading to the case dragging on for a considerable time.²²⁴

In addition to the costs associated with gaining access to courts, judges too play a role in the judgements they hand down. A judge may either be conservative or liberal when passing judgements. Some judges would accept access to information as an important issue which needs proper implementation and regulation and can call upon government to pass a legislation to execute the guarantee. Others take it upon themselves to interpret the guarantee and compel access to be provided or denied without making any effort of ascertaining if the case supports wide interpretation.²²⁵

²²⁴ Personal interview with UK/16, 09/12/04.

²²⁵ Personal interview with UK/15, 01/06/04.

Public servants as well as members of the public also lack awareness of the constitutional guarantees. As a result they do not know what they entail and how they affect them. This becomes an impediment in using the guarantees. Even where members of the public know about them, public servants may be uncertain as to where to start in providing access since the constitutional provisions do not guide them in this area.²²⁶

These shortcomings might be reasons why some countries having constitutional guarantees of access to government information have resorted to promulgating FOI legislation. While the South African constitution guarantees access to information, it also prescribed for promulgation of a law to turn the guarantee on access into practice.²²⁷ The constitution further provides a timeframe in which this was to be done, another indication of the fundamental nature of access.

In Malawi, the constitutional guarantee on access to information was difficult to implement partly because public servants still adhered to a culture of absolute secrecy that was prevalent in the Banda regime. The 1994 constitution was expected to have ushered in greater openness of government but it is having its efforts frustrated by statutes which are still premised on the now defunct constitution of 1961. Public servants are therefore caught in between the desire to open up brought about by the new constitution and curtailment of access to information professed by some of the statutes.²²⁸ This is an indication that access to information underpinned in a constitution needs a specific law which would guide public servants in its execution.

It is important for governments to protect access to information through constitutions. However, the constitutional protection in itself is not enough for citizens to have direct access to information. There is thus a need for specific access legislation which will provide qualifications to the constitutional guarantee as well as create an environment for its implementation.

²²⁶ Interview with MAL/8, 11/08/04.

²²⁷ South Africa Government *Constitution*

²²⁸ Personal interview with: MAL/9, 13/08/04.

4.7 Conclusion

Access to information has gained world-wide acceptance as a result of the efforts of international and regional treaties protecting freedom of expression. These treaties have gone further to discover that access to information facilitates free expression and is also an independent right. However, as the discussions have shown, the relationship is complex and dynamic, and is influenced by whether you perceive it from an access to information or freedom of expression viewpoint.

The importance of access to information in government has been realised in the roles it plays in contributing to the attainment of effective democracy. Other than contributing to the generation of informed consent and participation in governance of citizens, access has the capacity to reduce problems of information asymmetry and in the containment of state secrecy including the promotion and protection of the privacy of individuals. Democracy premised on access to information results in governance systems which are transparent and can better account for its deeds.

However, the need to resort to access to information will vary in terms of timing resulting from the development of interest towards access, the quantity of information to be accessed and the frequency with which access will take place. Nonetheless, an individual or group needs access to information to be guaranteed whenever they decide or feel the need for access. It is thus important for access to attain constitutional status in order to provide the guarantee. It is also important that there should be an access framework in place to facilitate the guarantee and to be able to deal with the variable demand for access and the wide variations of users. Invariably, information needs to be readily accessible despite the presence or absence of demand. Even though it is guaranteed by constitutional protection, full implementation of access to information is difficult to achieve directly from the constitution and therefore enabling legislation is needed to create a functional access framework.

As the next chapter will show, the ability to provide such access is also linked to the capacity of government in managing information. Records are among the most trusted sources of this information. On the one hand they provide information on government activities and processes and on the other, records are evidence of the manner in which government transacts its business. Records management therefore is an important component of the access framework.

Chapter 5: Implementing access to information through FOI legislation

5.1 Introduction

FOI legislation creates a legal framework for the effective implementation of access to information. It ensures the functionality and helps to correct the performance failures of constitutional guarantees on access to information. FOI legislation enables citizens to select the types, extent, quantity and quality of the information they want access to and to determine the timing of that access. FOI legislation further serves the dual purpose of improving the functionality of a constitutional requirement of access and of adding significant, if not crucial, vitality to the democratic process. It is a critical tool with which citizens are able to shape and determine their level and type of democratic engagement with the state. The review of literature and interviews suggest that the recipe for an effective access regime is a combination of FOI legislation with democracy, accountability, trust and records management, all which foster better and more honest governance.

A review of literature suggests that FOI is a 'right to know' more often than a 'need to know' and that the 'need to know' is effected by the constitutional guarantees on access. Although the 'need to know' does exist even in countries without codified constitutions, the enactment of FOI legislation is meant to give it effect. Therefore, through FOI legislation, both the 'right to know' and the 'need to know' are meant to coexist with one complementing the other. It is from this basis that an understanding of FOI in the case study countries without the legislation is established. In these, FOI is taken to be synonymous with the constitutional guarantees on access to information. However, there was general agreement in Botswana and Malawi that FOI legislation leads to the full functionality of the constitutional guarantees on access.

FOI legislation is credited with many things but the most important is its ability to correct the performance and failures of constitutional guarantees on access to information. The guarantees have been found lacking in enabling citizens to gain

direct access to information because of their failure to state succinctly the information to which access is guaranteed and how this will be achieved. The adoption of FOI legislation corrects this, as it spells out clearly all the modalities resulting in functional access to information by enabling citizens to determine the information they want access to and when. The enactment of FOI legislation does not intimate that the guarantees are redundant or useless but is an indication that the two can exist side by side with one correcting the failures of the other, thereby adding vitality to the democratic process.

The literature and case study country interviews suggest that an effective access regime is crucial. An effective access framework is arrived at by combining FOI legislation with democracy, accountability, trust and records management. These four processes not only rely on access to information but present FOI legislation with a solid launch pad for creating and implementing a practicable access to information regime which fosters better and more honest governance.

In line with the grounded theory research methodology which this study utilised, this chapter unearths three interrelated hypotheses from the implementation of access to information through FOI legislation. The first states that FOI legislation enhances and contributes positively to responsible government. Many governments around the world are responsible but on account of adopting FOI legislation, they have become more honest and more transparent. Secondly, FOI laws create clearer and vibrant information networks. These networks contribute immensely to generating and encouraging improved access to information. The last hypothesis posits that by means of FOI laws, citizens are better inclined to become more aware of the relationship they share with government. Through its potential to enhance democracy, accountability, trust and management of records, FOI legislation enables citizens to appreciate the role played by their informed consent and are better placed to guard against its infringement as they exercise their anticipated participation in their governance. The net result of these three hypotheses leads to the emergence of a governance structure in which practicable and functional access to information exists.

The chapter concludes by stressing that an effective access to information regime built on democracy, accountability, trust and records management creates a stimulus for enhancing access and the generation of better and more honest governance.

5.2 *FOI, the ‘need to know’ or the ‘right to know’?*

FOI in case study countries which have adopted the legislation is taken generally to bestow on citizens a legal right of access to information. It gives them an individual right to enquire into governance and to gain knowledge of what governments are doing on their behalf. Unlike constitutional guarantees on access, FOI legislation provides citizens with functional and practical direct access to information. Thus, FOI is a law which enables individuals or groups to ask government questions on its activities and processes. The answers to these either provides the access or are a catalyst which citizens can use to gain direct access to information.²²⁹ However, FOI is not intended to override the moral obligation to inform citizens by governments but to complement it through enabling citizens to seek access rather than just wait for government to provide it. FOI legislation creates a framework where government can exercise with due diligence its obligation of informing citizens while at the same time it allows and encourages citizens to gain direct access to official information.

5.2.1 The ‘need to know’ versus the ‘right to know’

Constitutional guarantees on access to information, despite their importance, are not functional in enabling citizens to gain direct access to information. Through them, government single-handedly determines the timing of informing citizens as well as selecting the information necessary to serve this purpose. Governments, therefore, use the guarantees to determine what citizens ‘need to know’ and use that knowledge to decide on the information required to satisfy the established need. The ‘need to know’ materialising from the constitutional protection of access, is corollary to the failure of constitutions in explaining clearly the information to which access is being

²²⁹ Personal interview with UK/11, 30/04/04.

protected, and the manner in which the access will be made possible.²³⁰ A vacuum is consequently created between the impending need to comprehend the information to which access is protected, and the manner in which the access is to be facilitated. It is because of this vacuum and the moral obligations which governments have in informing their citizens that the 'need to know' becomes an alternative.

It would be naïve to suggest that the 'need to know' is only brought about by constitutionally underpinning access to information. Several countries including the UK do not have codified constitutions and yet the 'need to know' environment exists in them. The governments of such countries do not have a single constitutional provision on the 'need to know' rather, they have at their disposal various methods of determining the information which they feel citizens would want to access and to facilitate access to it. These methods may include press releases and other government bred reports which are published for public consumption, question-answer sessions of parliament and the efforts of journalists in soliciting and publishing information. Governments do not need access to information to be constitutionally protected for them to understand and be able to determine what citizens 'need to know' but have a moral duty to ensure this take place. However, constitutional guarantees on access are effective in generating a realisable 'need to know' because of the importance derived from the supremacy, enforceability by courts and defined amendment procedures of constitutions. Where the 'need to know' is initiated through the constitutional protection of access, it achieves legal supremacy in that government becomes legally and morally obliged to provide access.²³¹

Information founded on the 'need to know' is usually made available to all citizens. Those who have an interest in the information to which access is permitted will gain the access since it will be in public domain in the form of press releases, reports and so on. In addition, the 'need to know' allows for an individual or groups to request for access to information which government may not have published but they will be expected to show cause or justify the importance of gaining access.²³²

²³⁰ See section 4.6.2.

²³¹ See section 4.6.2.

²³² Personal interview with IRE/1, 14/12/04.

FOI legislation brings about a legal 'right to know.' Rather than wait for governments to decide on what it expects them to know, individuals through FOI laws are at liberty to enquire into what they want to know and to seek direct access to the information which would satisfy this. Governments are also legally obliged through the legislation to state whether or not the information enquired into exists and to assist citizens to gain direct access to it.²³³ McMillan argues that FOI legislation removes the prerogative to solely determine what information to release and when.²³⁴ In as much as it removes this prerogative which results in citizens gaining equal access to information put into public domain, FOI laws mostly involve requests for information shaped by unconnected individuals. Access to information through FOI legislation is thus confined to an individual or group which made the request for information rather than to the mainstream public who can benefit from it as well.²³⁵ Although FOI legislation appears to be restrictive, it has the potential to open access to information not just to the individual who would have made a request for information, but to many others who may have interest in it. Even though individuals may gain direct access resulting from the requests they would have made, other information brokers in the form of members of parliament, journalists and others, can gain the access and publish the results for the benefit of other members of the public.

In establishing a 'right to know' FOI legislation creates a framework which is able to provide practical and functional access as and when individuals decide or feel the need to access information. Although the legislation creates this framework, it also mandates governments to continue with their moral (and even legal) obligations of informing citizens in line with the 'need to know.' Governments are therefore expected to inform citizens whether or not requests are made for access to specific subject oriented information.²³⁶ FOI laws create an environment where the 'need to know' and the 'right to know' coexist. In other words, FOI legislation is a tool which energises constitutional guarantees on access. The guarantees in themselves also

²³³ Personal interview with SA/4, 15/08/03.

²³⁴ J McMillan 'Twenty years of open government-what have we learnt?' Inaugural Professorial Address, delivered on 4 March 2002. Available at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/australia/McMillan%20-%2020%20yrs%20of%20FOI%20in%20Aust.pdf. Accessed 24/02/06.

²³⁵ G Terrill 'Individualism and freedom of information legislation' in *Freedom of Information Review* 87 (2000): 30-32.

²³⁶ Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians*: 17-20.

present citizens with other alternative methods of accessing information which may not be available through FOI legislation.

5.2.2 Understanding of FOI in non-FOI countries

While respondents in Ireland, South Africa and the UK had some common conception of FOI legislation and its benefits, those in Botswana and Malawi had somewhat differing views. Some respondents in Botswana and Malawi envisaged FOI legislation to be synonymous with constitutional guarantees on access to information and others saw it as facilitating the functionality of such guarantees. Despite the differing perceptions, respondents in both these countries agree that underlying FOI legislation is the provision of access to information and that FOI is a tool that generates more openness in government.

The understanding of FOI in Botswana and Malawi is influenced by the absence of a FOI law in both countries. As a result, respondents who came across such a law in literature or through other means often took it to be synonymous with the constitutional guarantees on access to information. A respondent in Botswana spoke of “constitutional guarantees of freedom of information”²³⁷ another in Malawi talked of “freedom of information as contained in the constitution.”²³⁸ One striking feature derived from this match is that both Botswana and Malawi have constitutionally guaranteed access to information. In guaranteeing access to information whether as a facilitator of freedom of expression or as an independent right, both countries are not guaranteeing FOI. The resemblance is that underlying FOI legislation is access to information hence, access to information protected by the constitution is thought to have similar nuances as FOI.

The other basis for equating the guarantees on access with FOI law is an outcome of associating both modes of access with open governance. Access to information whether through constitutional fortification or FOI legislation is seen as a tool towards opening up government activities for public scrutiny.²³⁹ Both are seen as

²³⁷ Personal interview with BW/5, 03/08/04.

²³⁸ Personal interview with MAL/6, 10/08/04.

²³⁹ Personal interview with MAL/7, 11/08/04.

enabling citizens to gain access to information derived from the workings of government and are taken to facilitate transparent government systems. Although both are tools contributing to openness of government they still are not synonymous. One respondent in Botswana stated that through “FOI people have access to whatever government is doing. Government is more transparent because people can readily access information resulting from what government does.”²⁴⁰ However, through the guarantees on access, government’s transparency is limited to the amount and depth of information it releases. Thus, even in terms of opening up government, the guarantees on access and FOI legislation do not equate.

However, FOI legislation is also understood in both countries as a tool which is needed to induce and implement constitutional guarantees on access. In the words of a respondent in Malawi “the guarantee on access to information is there but how can people use it to get the information?”²⁴¹ This comment shows an acceptance that it is problematic to implement access to information guaranteed by constitutions without adopting FOI legislation. It further shows that FOI legislation and the guarantees are not synonymous but that the legislation has the potential to make the guarantees practicable.²⁴²

One seemingly negative understanding of FOI in Botswana and Malawi was that it is an attempt at prying into the activities and operations of government. Respondents espousing this understanding contended that FOI is akin to drying governments’ ‘dirty linen’ in public. One respondent stated that “in as much as government has to be open, we should not forget that it has some secrecies to protect. FOI or no FOI, government can be open. All that FOI should do is to allow members of the public access to the information which government wants them to.”²⁴³ It has to be remembered that the ‘dirty linen’ in question is ‘public linen.’ How it became dirty is through misdeeds that need correcting. FOI legislation enables citizens to identify the ‘dirty linen’ and to assist government in containing and managing them. FOI legislation should not be seen only as a deterrent of certain government practices, it should be seen as a modality which aims at improving the way things are done.

²⁴⁰ Personal interview with BW/7, 22/10/04.

²⁴¹ Personal interview with MAL/2, 09/08/04.

²⁴² See section 4.6.

²⁴³ Personal interview with BW/6, 04/08/04.

Nonetheless, this viewpoint espoused by these respondents is indicative of a culture of secrecy in which some public servants work.

The understanding of FOI legislation in both Botswana and Malawi is therefore influenced by the awareness of access to information as protected or implied in the constitutions of these countries. As a result, FOI legislation seems to be a derivative of the guarantees on access, hence the two are taken to be synonymous. Notwithstanding this, there is acceptance in both countries that the guarantees on access are difficult to implement and to utilise and are in need of a practicable framework which FOI law brings about.

5.3 Distilling the importance of FOI legislation: correcting failures of constitutional guarantees on access

The reliance of both Botswana and Malawi on constitutional guarantees for the provision of access to information is limiting in many respects. Apart from the importance of stating governments' pledge and obligation in enabling access, they have problems in permitting practicable direct access to information by citizens resulting from undefined access framework. One of the main aspects of FOI legislation is its capacity to correct these failures of the guarantees.

Access to information in four of the case study countries is protected explicitly (Malawi and South Africa) and implicitly (Botswana and Ireland) through constitutional guarantees. Implementing the access by virtue of reference to the guarantees is marred with problems. These include the absence in the guarantees of qualifications which clearly explain, the information to which access is protected; the modalities for accessing the information; and many other logistical issues which would facilitate functional direct access to information.²⁴⁴ Clearly, constitutions are not intended to define these precise aspects of implementing access but their purpose is to pledge, guarantee and protect access to information. The gist of implementing the access is made possible through an enabling legislation in the form of FOI. As a respondent in the UK observed:

²⁴⁴ See section 4.6.

You need to have a whole lot of things in the legislation. You need to be able to say precisely what these rights are, you need to be able to say what exemptions are because no government in the world is going to release everything...you need to put in administrative procedures and checks and powers to various officials... there is definitely a need to spell out all the details in the legislation and a general constitutional guarantee will not do this.²⁴⁵

The enactment of FOI legislation creates a functional access to information framework. The framework dispenses various responsibilities to facilitate the access and spells out clearly all the steps necessary to achieve access and make it functional. It also details remedial measures in the event the access is contested. The failures of the guarantees are thus corrected and the guarantees are made to function.

The ability of FOI legislation in correcting problems of implementing access to information directly from the constitutional guarantees is made clear through the declaration in the 1996 constitution of South Africa calling for the enactment of a specific law to facilitate access the guarantee protects. This constitution would not have made the declaration for enacting a specific law had the guarantees had the capacity to guide the implementation of access. Through the declaration, the constitution was acknowledging that attempts to implement access without guidance of a specific access law would be fraught with problems. Peters opined that in Malawi “specific legislation is essential if the constitutional guarantee...is to be effectively implemented in practice...such legislation would help to establish public awareness on the notion of freedom of information and would ensure the active use of the constitutional right.”²⁴⁶ More generally, Saba added that:

As constitutional recognition of the right to request information from government does not suffice, legislating an end to incentives to withholding information becomes imperative. Safely assuming that bureaucracies will try to find a means, excuse or reason not to provide information requested of them, legislation can help remove the persistent obstacles that might otherwise become the norm. As in a maze with multiple exits, laws can block all possible escape

²⁴⁵ Interview with UK/13, 19/05/04.

²⁴⁶ A Peters Malawi, *Submission to the Law Commissioner on implementing constitutional guarantee of freedom of information* (London: Article 19 and The Media Institute of Southern Africa, 1999). Available at <<http://www.article19.org/docimages/240.htm>>. Accessed 08/04/03.

routes for administrations tempted to overlook their constitutional responsibilities.²⁴⁷

Without the enactment of a specific FOI legislation in Botswana and Malawi, the right of access which is protected in the constitutions of both countries, will not have fundamental benefit to citizens. No matter the administrative procedures on access to information which any one of these countries may impose, problems resulting from insufficient access will always exist. In Botswana, the government has employed Public Relation Officers to enable better access of information. According to a report in *Mmegi* newspaper in 2005, these officers at times have to seek permission from their superiors before they can release information for public consumption.²⁴⁸ Evidently, these officers do not have sufficient guidance from the administrative procedures that are in place on access. Problems such as these will continue if both countries delay promulgation of FOI legislation.

It is only through the guidance of a specific FOI law that full functionality of the guarantees on access can be attained. FOI laws create an access framework which defines the information to which access is available; the modalities leading to comprehensive access; the information exempted from access; the institutions charged with oversight for the access; and many other traits culminating in functionality of access.

5.3.1 Validity of the constitutional guarantees on access once FOI has been legislated

Legislating FOI to correct the problems bedevilling constitutional guarantees on access is not an indication that the guarantees have lost significance or that their prominence in a country's legislative setup have been relegated. It is rather an indication that the guarantees on access are fundamental and warrant being made functional for all citizens to enjoy.

²⁴⁷ R Saba 'The right to access government information' in *Access to information in the Americas* (Washington, DC: Inter American Dialogue, 2002): 26. Available at http://www.thedialogue.org/publications/programs/policy/politics_and_institutions/press_freedom/AccessReport.pdf. Accessed 20/04/05.

²⁴⁸ B Piet 'Govt PROs create more problems' *Mmegi* 22:106. Available at <http://www.mmegi.bw/2005/July/Wednesday13/63377084328.html>>. Accessed 15/07/05.

Through legislating FOI, countries like South Africa were compelling themselves towards creating an overarching access to information environment under the auspices of both the guarantees on access and FOI. This environment ensures that both modes of access are not in competition but existed to complement one another. Such environments imply three things:

- Constitutional guarantees on access are supreme and are not superseded by FOI legislation. They exist to provide a benchmark upon which FOI will be premised;
- The guarantees can be appealed to without necessarily linking them to FOI legislation;
- Both the guarantees and FOI have judicial protection.

FOI legislation does not provide access to all information to which citizens would want access. Citizens seeking access to information not covered by FOI legislation can turn to the guarantees for this purpose. Though the access may be gained after protracted and costly court battles, this is a further indication of the fundamental nature of the access. By having constitutional protection, access to information thus enjoys court enforcement where regulations are lacking or are deemed unconstitutional. By further having FOI legislation function alongside the constitutional guarantees also infers the supremacy of the access. Arising from the supremacy is the understanding that the FOI law will propagate the intentions of the guarantees thus it will be at par or above the objectives associated with them. The guarantees therefore seek to guide and control the constitutionality of FOI laws. Access to information founded on both the guarantees and FOI laws has a far greater effect in reducing information asymmetries and state secrecy. Through their combined operation, access to information becomes the norm because of the dual approach in creating an access to information framework.

5.4 Recipe for an effective FOI regime

An effective FOI regime results from a combination of many logistical concerns. When combined with democracy, accountability, trust, records management, and being balanced with personal privacy, FOI legislation has the potential of creating an effective access to information regime. Democracy as a system of governance attains its legitimacy from the informed consent of citizens and gains guidance from a constitution to provide a propitious environment for the functionality of FOI legislation. This is further given impetus by the obligation of government to be accountable to itself, parliament and to citizens. Where trust also exists between citizens and government, the effective functionality of FOI legislation is likely to be accomplished. Although FOI is not a records law it mandates legal access to recorded information of which records are a constituent part. When integrated with a practical records management programme, FOI legislation will have the capacity to become very effective in the provision of access to information. The collective consequence of all these ingredients is an adequate recipe for an effective FOI regime.

5.4.1 Combining FOI with democracy

Section 4.4.1 alluded to the importance of access to information in the democratic process but it did not define the concept of democracy. The term democracy is difficult to define and various comprehensions exist across the academic disciplines. For purposes of this study, democracy is a system of governance which obtains legitimacy from the informed consent of citizens and governs through the guidance of and observance to a constitution. Democracy is thus underpinned by, among other things on free and fair elections, effective participation of citizens in governance, guarantees of rights and freedoms, effective opposition and access to information.²⁴⁹

²⁴⁹ See generally J Habermas *Between facts and norms: contributions to a discourse theory of law and democracy* (translated by W Rehg) (Cambridge: Polity Press, 1996); R Dworkin *Freedom's law, the moral reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) and R A Dahl *On democracy* (New Haven, CN: Yale University Press, 1998).

- **Free and fair elections**

Elections which are free and fair have to be held periodically and this period has to be spelt clearly in the constitution. Elections offer members of the public with the opportunity of deciding and selecting people to govern on their behalf.

However, Schedler, Diamond and Plattner argued that elections are an insufficient indicator that citizens in a particular country enjoy full participation in the democratic process. They argued that elections are necessary but they are not:

sufficient condition for keeping state power under control; protecting civil liberties; making public officials follow established rules and procedures; making them observe norms of fairness and efficiency in the appropriation and expense of public money; and deterring them from exploiting public office for private gain.²⁵⁰

Elections are just one of the elements which contribute to citizen participation in the democratic process. Permeating the ability to participate in the democratic process is the ability of citizens in accessing government information. One UK respondent argued that “without access to the information, without knowledge as to what government bodies are doing, then the individual is not empowered to know what it is that they may be exercising their votes on or against in the elections.”²⁵¹ Within an FOI environment, citizens are better placed to access government-held information for purposes of participation in elections and offering informed legitimate consent. Although elections are not the sole indicator of democracy, they offer FOI legislation a ground on which to make improvements to governance. In making assurances for the conduct of elections, governments are also assuring provision of access to information which could enhance the generation of the informed consent. This assurance presents FOI legislation with a firm base on which to develop since the importance of access to information for purposes of cultivating informed consent already exists. Hence, the purpose of the legislation would be to enhance access through the imposition of a formal regulatory and implementation framework. FOI legislation built on this environment enables citizens to shape their informed consent

²⁵⁰ A Schedler L, Diamond M F Plattner (eds.) *The self restraining state: power and accountability in new democracies* (Boulder, CO: Lynne Rienner Publishers, 1999):2.

²⁵¹ Personal interview with UK/12, 18/05/04.

parameters and to determine their expectations of it. In this way, FOI laws enable citizens to shape and to influence their democratic process through defined and practicable access to information framework. The result of this would be a government which is more responsive to citizens and one which is honest in undertaking of public affairs.

- **Effective participation of citizens in governance**

This is not just restricted to elections where the public participate to choose their representative through the ballot but extends to making inputs to decisions; evaluating programmes and services, and responding to policies which government has set aside for citizens.

According to Neuman, the success of any democratic government depends on a public which is knowledgeable and “whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold their public officials accountable.”²⁵² In principle, democracy is premised on having a “basic right to know, to speak out, and to be informed about what the government is doing and why and to debate it.”²⁵³ Democracy, Mendel observed, “cannot flourish if governments operate in secrecy, no matter how much open discussion and debate is allowed. Indeed, the very nature and quality of public discussion would be significantly impoverished without the nourishment of information from public authorities.”²⁵⁴ A UK respondent maintained that “access to information is essential to enabling full citizen participation in a democracy. If citizens do not have access to information about what public entities are doing, how can they actively participate in what these entities are doing?”²⁵⁵

Access to information in a democracy enables citizens to understand better the governance process followed and to shape their effective participation in it. Building FOI legislation on this premise has the potential to improve the quantity and quality of

²⁵² L Neuman ‘Introduction’ in L Neuman (ed.) *Access to Information*: 5.

²⁵³ J Stiglitz ‘Transparency in government’: 29.

²⁵⁴ T Mendel *Freedom of information as an internationally protected human right* (London: Article 19,) Available at <<http://www.article19.org/docimages/627.htm>>. Accessed 17/02/03.

²⁵⁵ Personal interview with UK/12, 18/05/04.

the information available for access. Subsequently, through the platform for access to information, democracy presents FOI with a solid foundation on which to legislate and regulate the access. Armed with the right of access, citizens are able to understand government process and how its activities are transacted, and can then decide the time convenient to influence these and how best to do so.

- **Guaranteeing of rights and freedoms**

In democracies, government identifies and guarantees rights and freedoms for the enjoyment of the citizens through constitutional provisions. Molomo opines that democracy “cannot develop in the absence of the minimum liberties, such as freedom of speech, freedom of association and assembly, voting rights, multi-party politics, as well as free and fair elections.”²⁵⁶ In fact, access to information as section 4.4.1 has shown is pivotal to the democratic development in that it triggers or is a catalyst for these other rights and freedoms. Since democratic governments gain their legitimacy from among others, the constitution, it is crucial that access to information is accorded precise constitutional protection.²⁵⁷

- **Free and vibrant press**

The existence of a press which is independent creates checks and balances on the operation of government. Its concern is sourcing out information and passing it onto citizens. The press is another medium of access to information by citizens.

A press which is vibrant and free is another component of democracy favourable for establishing an effective FOI regime. Implementation of FOI legislation through the combined efforts of many stakeholders, journalists included, creates clearer and vibrant access networks capable of obtaining more information from government than before. Through sourcing out information, journalists are utilising access to information to inform citizens. A democracy which encourages a press which is free and vibrant, and additionally promotes access to information has the potential to become more transparent and accountable.

²⁵⁶ M G Molomo ‘The role and responsibilities of members of parliament in facilitating good governance and democracy’ in W A Edge and M H Lekorwe (eds.) *Botswana: politics and society* (Pretoria: J. L. van Schaik Publishers, 1998):201.

²⁵⁷ See sections 4.5-4.6 and 5.2-5.3.

- **Effective opposition**

Opposition parties which are effective indicate that government is not a monopoly of the party in power. An effective opposition creates further checks and balances on government on behalf of the people. Opposition parties rely on access to information for them to become effective in governance debates. The information which they gain access to enables them to understand what government is doing and become better informed in order to devise alternative approaches. Access to information contributing to effective opposition provides an ideal environment in which to implement FOI legislation. Through FOI legislation the capacity of a formidable and knowledgeable opposition is enhanced.

Underlying effective democracy is the ability of citizens in accessing information, expressing it, using it to bestow informed consent and further using it as it communicates with government. Respondents and literature are in agreement on the importance of information to citizens. In Dworkin's words:

Democracy requires that citizens be given an opportunity to inform themselves as fully as possible and to deliberate, individually and collectively, about their choices, and it is a compelling strategic judgement that the best way to provide that opportunity is to permit anyone who wishes to address the public to do so, in whatever way and at whatever length he wishes, no matter how unpopular or unworthy the government or other citizens deem his message to be.²⁵⁸

It is apparent that effective democracy results from an environment where citizens have access to information. However, functional access to information regimes are not created in vacuum but through FOI legislation. A UK respondent highlighted that "access to information through FOI is what makes democracy work."²⁵⁹ This is corroborated by Ponting, a UK activist who argued that FOI legislation:

raises the question of whether democracy is simply a matter of putting a cross on a ballot paper once every four or five years and then leaving a small group of some...politicians and top civil servants to govern the nation and occasionally tell...us what they

²⁵⁸ R Dworkin *Sovereign virtue, the theory and practice of equality* (Cambridge, MA: Harvard University Press, 2000):358-359.

²⁵⁹ Personal interview with UK/15, 01/06/04.

are doing by releasing some information in support of their decisions. With Freedom of Information we could have a much better-informed democracy in which...individuals would be able to question more effectively what is done in their name and influence decisions before they are made.²⁶⁰

The absence of FOI legislation is likely to impair the democratic process as members of the public are unable to “participate in the process of government, make informed choices about who should govern them and properly...scrutinise officials to ensure corruption is avoided. Government officials also fail to benefit from public input which could...improve their decisions.”²⁶¹ Democracies that lack FOI legislation are more likely to be secretive, have their decision-making process obscured from public scrutiny and become breeding grounds for corruption.²⁶²

One UK respondent has suggested that democratic governments do not necessarily need to adopt FOI in order for citizens to gain access to the information government holds. He stated that: “some governments which do not have FOI can be very transparent and accountable more than those that have the law. All they have done is to introduce measures which facilitate access to information without necessarily legislating for the process”²⁶³ The premise of this argument is that government can issue regulations and procedures guiding citizens’ access to government-held information. Theoretically, this is a plausible reasoning but practical experience from some of the case study countries suggests that the argument is flawed. For instance, the UK in 1994 issued a non-statutory Code of Practice on Access to Government Information which was enforced by the parliamentary Ombudsman.²⁶⁴ The initial shortcoming of the code was that it lacked legal force. In theory, the code was an expression of the UK government’s commitment of informing its citizens. Since, it lacked legal grounding, the code fell short of establishing an access framework equivalent to those brought about by FOI laws.

²⁶⁰ C Ponting ‘Secrecy and Freedom of Information’ in J Neuberger (ed.) *Freedom of Information-Freedom of the individual?* (London: Papermac, 1987):17

²⁶¹ Article 19 *Freedom of Information in Southern Africa*.

²⁶² J Pope *TI source book 2000*. See also section 4.4.3.

²⁶³ Personal interview with UK/10, 10/04/04.

²⁶⁴ United Kingdom Government, Department for Constitutional Affairs *Open government: code of practice on access to government information* 2nd edn. (London: Her Majesty’s Stationery Office, 1997). Available at <<http://www.dca.gov.uk/foi/ogcode981.htm>>. Accessed 16/07/05.

The code therefore was an open government initiative but did not give citizens a legally enforceable right to gain direct access to government information. This and other deficiencies of the code (i.e. channelling complaints on access to information through a member of parliament; lack of powers to order release of information by the Ombudsman) imply that the ability to gain access to information under the code was inhibited by government's control. Government could choose whether or not to sanction access to the information it held. This meant citizens could not inform themselves fully and neither could they be effective participants in their governance. These shortcomings could help to explain the adoption and replacement of the code with FOI legislation in 2000 by the UK government.

Some respondents in Botswana and Malawi have attributed limited citizen participation in the entire democratic process to the absence of FOI legislation.²⁶⁵ The constitutional guarantees, they felt, released very little information into the public domain thus enforcing the already existing information asymmetries. For instance, one respondent in Botswana stated that "the current situation is that government bureaucracy is very tight and access to public service information is very strict and very limited...So I will say that the public is deprived too much public information."²⁶⁶ Where access to information is not equal or near equal for both government and citizens, government will always have an upper hand in governance and the participation of citizens, opposition parties or journalists, in their governance will be restricted to the information which government makes available to them. Restricted access in both Botswana and Malawi resulting from the absence of FOI legislation inhibits the development of better and more honest governance process. A government which is trusted to be honest by citizens fosters better governance approaches conducive to better public service.

Democracy is likely to be more effective once FOI has been legislated. However, FOI legislation is also likely to be effective within a democratic setting which promotes access to information; is premised on informed consent; has a vibrant press which is free and an effective opposition party system; and were citizens

²⁶⁵ Personal interviews with BW/4, 02/08/04 and MAL/9, 13/08/04.

²⁶⁶ Personal interview with BW/5, 03/08/04.

participate fully in governance. Democracy, in acceding to the importance of access to information through constitutionally underpinning it, the moral and legal obligation of government to inform, and through the values derived from informed consent, is laying a foundation for an effective functioning of FOI legislation. The enactment of FOI legislation is also a contributory factor leading to the amendment of other laws which were initially anti-access thus creating more open, honest and better governance.

5.4.2 Combining FOI with accountability

Accountability is taken to be a norm in any democratic setting. From this perspective, accountability is taken to facilitate access to information and access to information does the same for it. FOI legislation is thus taken to be a part of a government's strategy to attain accountability. FOI is meant to complement other accountability procedures rather than to make them ineffective. Legislating FOI has the capacity of improving accountability and an efficient accountability terrain can lead onto an effective FOI regime.

Defining accountability is difficult because the term is multidisciplinary and may mean different things within and across the disciplines. Franceschet contended that accountability has four component areas:²⁶⁷

- A person or a group assigned certain responsibilities;
- Their obligation to report on performance;
- Monitoring of their work by someone else, i.e. parliament, opposition parties, ombudsmen, citizens;
- A consequence either positive or negative follows the monitoring.

From a democratic perspective citizens assign government the responsibility to govern on their behalf thus obliges it to report back to them on the performance of all governance structures. Further to this, government creates internal and external measures to monitor its performance and based on the outcome of the monitoring,

²⁶⁷ M Franceschet 'Public accountability and access to information' in Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians*.

recommendations reprimanding or complementing the efforts made are issued. Thus, the purpose of accountability is to control the misuse of authority; provide an assurance on the expenditure of public resources; and to promote continuous oversight which could lead to improvements in the accounting process and the execution of responsibilities.²⁶⁸ The main issue underlying accountability is performance. Performance is monitored and finally evaluated. Accountability therefore imposes on whoever is given responsibility to perform the duty to account to those they are answerable to.

Accountability, according to Aucoin and Heintzman, is intended to serve three purposes. First, it is aimed at controlling and regulating the abuse or misuse of the authority which citizens accord government as it rules on their behalf.²⁶⁹ As argued in section 4.5, the constitution is a key tool which citizens use to regulate and control the use of authority by government. However, further control and regulation of the authority is achieved through ensuring that, government is transparent in its operations and has committed itself to reporting back to citizens on its performance; parliament and the media are empowered to assume roles of watchdogs thereby creating checks and balances on the use of the authority; there is a framework allowing citizens access to information to verify reports government makes to them; institutions with greater autonomy of operation exist to scrutinise and audit executive and administrative behaviour and report to citizens through their representation in parliament.²⁷⁰ Through the combined effort of these measures government is expected to be accountable for its actions. Second, accountability is also intended to provide, citizens directly or through their representatives in parliament, donor agencies, international institutions and other governments, with an assurance that the funds obtained from them are well expended and that public service values were being followed.²⁷¹ Lastly, accountability is intended to promote continuous improvements in governance.²⁷² As accounts are made, feedback is generated on them and it is through this process that inputs are made to improve the performance of governance. Since the

²⁶⁸ M Franceschet 'Public accountability and access to information.'

²⁶⁹ P Aucoin and R Heintzman 'The dialectics of accountability for performance in public management reform' in B Guy Peters and D J Savoie *Governance in the twenty-first century* (Montreal: Canada Centre for Management and Development, McGill-Queens University Press, 2000): 244.

²⁷⁰ P Aucoin and R Heintzman 'The dialectics of accountability:'260-265.

²⁷¹ P Aucoin and R Heintzman 'The dialectics of accountability:'266-271.

²⁷² P Aucoin and R Heintzman 'The dialectics of accountability:'272-276.

accounting process is expected to be continuous, the anticipation is that improvements will continuously be made on the performance of government.

Schedler stated that, in order to achieve the above intentions, accountability “involves the right to receive information and the corresponding obligation to release all necessary detail. But it also implies the right to receive an explanation and the corresponding duty to justify one’s conduct.”²⁷³ Accountability is thus taken to be provision of access to information by one who is accountable to persons to whom the account is owed.²⁷⁴ “Information is required to give stakeholders the opportunity to make decisions or take action concerning organisational behaviour...”²⁷⁵ The success of accountability depends on whether citizens have timely access to information which is complete, accurate, adequate and reliable.

Access to information is crucial for accountability. People charged with the duty to account need access in order to formulate the account and the recipients of the account also need further access to verify the content and context of the account. However, as Swift has argued, access to information for purposes of accountability is not discretionary but mandatory. Accountability is “not essentially concerned with discretionary or voluntary disclosure, but rather with the institutionalisation of legal rights for stakeholders to information concerning corporate behaviour.”²⁷⁶ Since accountability is expected to provide a comprehensive account of a performance, discretionary disclosures do nothing more than restrict the value and importance of the account made. That is, through this form of disclosure, only the information deemed conducive by the one submitting the account is released. Other information which may shed more light on the account or lead to challenges to be made against it will not be provided through this mode. Where disclosure is mandatory, access is open to most information relating to the account, and it also enables recipients of the account to seek access to additional information which may help decipher the account presented to them.

²⁷³ A Schedler ‘Conceptualising accountability’ in A Schedler, L Diamond, M F Plattner (eds.) *The self restraining state: power and accountability in new democracies*:14.

²⁷⁴ T Swift ‘Trust, reputation and corporate accountability.’ *Business Ethics: A European Review* 10:1 (2001): 16-26. Available at <<http://www.blackwell-synergy.com/links/doi/10.1111/1467-8608.00208>>. Accessed 27/02/06.

²⁷⁵ T Swift ‘Trust, reputation and corporate accountability.’

²⁷⁶ T Swift ‘Trust, reputation and corporate accountability.’

Since FOI legislation introduces a legal right of access to information and builds viable networks of access, it aids in further development of the accountability domain. As one respondent in the UK opined, FOI legislation “opens up accountability because it enables citizens to hold government to account.”²⁷⁷ No longer are recipients of accounts restricted only to the information somebody feels they need to know about relating to the account made, they in themselves are also empowered to seek direct access to other information which may help them understand the account better. People given the responsibilities to account also have access to an array of information including that held by citizens, which will assist them in bolstering their performance and the quality of the accounts they make.

When accounting to citizens, governments often use discretion in selecting and disclosing the information they feel will suit the accounts they present. Upon scrutinising the accounts submitted to them, citizens by means of FOI legislation have rights of access to other bodies of information which government may have not proactively disclosed. A UK respondent observed that FOI enables “citizens to legally hold government to account. Where governments are unwilling to account, FOI provides citizens with defined measures for making them account.”²⁷⁸ While governments have the moral responsibility to make accounts, FOI legislation provides them with a reminder that they are legally obliged to account and that citizens should be allowed to gain direct access to them. Although governments like that of Botswana are known to be accountable, the absence of FOI legislation denies them the opportunity to benefit from additional modes of accountability which are likely to develop once the legislation has been adopted.

Access to information for purposes of accounting presents yet another composite element which is beneficial for the creation of an effective FOI functionality. Even though FOI legislation is expected to enhance the efficacy of accountability, the importance of accountability is in itself an incentive for effective FOI. Access to information in accountability domains is already a norm and has the potential to trigger easier compliance to FOI legislation.

²⁷⁷ Personal interview with UK/15, 01/06/04.

²⁷⁸ Personal interview with UK/15, 01/06/04.

5.4.3 Combining FOI with trust

Accountable governments command varying levels of trust influenced by their capacities in providing and facilitating access to information. Trust, Corriveau suggested:

requires qualities such as honesty, integrity, altruism and even benevolence. Trustworthiness requires discreteness, reliability, transparency, and predictability. Trust involves interdependence and therefore vulnerability and risk. Trust is fundamental to successful transactions; it engenders learning, growth, co-operation, and collaboration. Finally, trust is dynamic; it can change in nature and fluctuate over time.²⁷⁹

Trust is a primary aspect of the relationship between a government and citizens. It entails “differences in power and control. The one who trusts assumes a position of subordination and relinquishes decisions and behaviour control to the one who is trusted...The trusting person trades behavioural and decision control for cognitive control...and secondary control.”²⁸⁰ When citizens trust a government, they do so believing that any risk which they may be exposed to will be managed. When citizens cede power to government, they expect it to control all the risks associated with governance. Hence, government is expected to devise strategies to counter all the potential risks which citizens are likely to face. However, in ceding risks associated with the governance process to government, citizens are in turn faced with newer risks, one which is ‘can we really trust the people we have shown trust to?’

Underlying this relationship is the moral obligation for governments to act in good faith and the belief of citizens that governments will do so.²⁸¹ It is through its determination and display of acting in good faith that government wins over the trust of citizens. Trust depicts that citizens have confidence in the goodwill which government displays.²⁸² According to Swift:

²⁷⁹ G M Corriveau ‘Trust within and among organizations as it relates to the access to information framework’ in Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians*.

²⁸⁰ G Cvetkovich and R E Löfstedt ‘Introduction’ in G Cvetkovich and R E Löfstedt (eds.) *Social trust and the management of risk* (London: Earthscan publications Ltd, 1999):4-5.

²⁸¹ T Swift ‘Trust, reputation and corporate accountability.’

²⁸² T Swift ‘Trust, reputation and corporate accountability.’

where trust is present the trusted tend to disclose more accurate, relevant and complete information, whereas the trusting feel less need to impose social controls in order to gain access or influence over the information.²⁸³

Underpinning trust of citizens in the governance process is access to information. Where governments provide access to information which is accurate, relevant and complete they are likely to gain the trust of citizens. It is through access to such information that citizens are able to shape their informed consent and to guide their participation in governance. Informed consent as O'Neill observed can "provide a basis for trust provided that those who are to consent are not offered a flood of uncheckable information, but rather information whose accuracy they can check and assess for themselves."²⁸⁴ An inference that arises here is that, access to information presents citizens with the prospect of verifying the information which government makes accessible to them. Only once they have corroborated this information are they better placed to offer the informed consent.

Informed consent connotes that citizens trust the information which they have had access to. As a result they can built opinions from it and are convinced that the consent they give to government is appropriate. In other words, citizens offer informed consent because they have developed trust on the people who are to form government. In support, O'Neill suggested that in:

judging whether to place our trust in others' words or undertakings, or to refuse that trust, we need information and we need the means to judge that information...Reasonably placed trust requires not only information about the proposals or undertakings that others put forward, but also information about those who put them forward.²⁸⁵

Even though democracy subscribes to the development and proffering of informed consent, and to the effective participation of citizens in governance, it has direct links with accountability and trust. Underpinning all the three is the performance of a government. In fact, it is the uncertainty associated with the performance of a government which brings them together. Citizens in a democracy are expected to

²⁸³ T Swift 'Trust, reputation and corporate accountability.'

²⁸⁴ O O'Neill 'A question of trust: trust and transparency' lecture 4, Reith Lectures, 2002. Available at <<http://www.bbc.co.uk/print/radio4/reith2002/lecture4.shtml?print>>. Accessed 17/03/05.

²⁸⁵ O O'Neill 'A question of trust: trust and transparency.'

offer informed consent because they are uncertain about the anticipated performance of the few who are selected to represent them in government. To guard against this uncertainty, citizens expect their representatives to account on the performance of their given responsibilities. The representatives are also wary of the fact that citizens are unsure of the effects of their performance and chose to account to ease this uncertainty. Despite the uncertainties of the performance of government, citizens offer informed consent with the trust and expectation that their representatives will perform accordingly. The process which ties the performance of government to these three areas is access to information. Access to information leads to informed consent, effective accountability, and evolution and maintenance of trust. FOI legislation predicated on this environment becomes very effective because access to information is already a norm, and all the legislation will do is to introduce viable networks and a regulatory environment to facilitate the efficiency of access.

5.4.4 Combining FOI with records management

Although existing FOI laws do not usually express requirements for records management, through suggesting that records have to be created, managed and disposed, this is nonetheless implied. The Irish and Canadian Information Commissioners have linked records management to access to information in several of their reports. Further links between these two processes have been revealed through some of the investigations that the Information Commissioners would have carried out in their jurisdictions.²⁸⁶ The reports and the investigations have revealed that the ability of government in providing access to information through FOI legislation rests on its capacity to manage records. In support, Mendel contended that an:

effective access to information system depends on good records management; if public bodies cannot find the information being sought for, or have to spend excessive amounts of time locating it, the system will fail to deliver the desired results. Records management also has implications for costs, whether they are borne by the requester or the public body in question, as time spent searching has to be paid for.²⁸⁷

²⁸⁶ For instance see Ireland Government, Office of the Information Commissioner *Freedom of information act-compliance by public bodies*.

²⁸⁷ T Mendel 'Parliament and access to information: working for transparent governance.' (Washington, DC: The World Bank, 2005): 35. Available at <http://siteresources.worldbank.org/WBI/Resources/Parliament_and_Access_to_Information_with_cov er.pdf>. Accessed 17/02/06.

An efficient records management system provides additional incentives for an effective FOI regime. It ensures that information needed for purposes of access through the legislation is available when needed and that it is arranged making it easy for its identification and retrieval.

FOI legislation typically requires the publishing of manuals that identify record classes, or series, a particular organisation holds. One of the purposes of the manual is to enable citizens to know which records they are likely to access from respective organisations. Another provision of the legislation obliges organisations to inform requestors for access if the information they seek is held or not. FOI laws also expect organisations to develop the capacity of providing access to information sought within a stipulated timeframe e.g. 20 or 30 days. Where the access has been denied or is contested, the law allows for a review process. The law may also direct organisations to undertake proactive disclosures even where requests for access have not been made. All these processes underpinning FOI legislation imply the ability to provide access to records by organisations thus making records management one of the ingredients needed to make FOI effective.

- **FOI manuals**

By providing guidance to the records held through grouping them into classes, series or categories, FOI manuals²⁸⁸ are making reference to records management. In order for them to group records into classes and/or series, organisations have to know and understand the content, context and structure of the records they hold. For them to know the records they hold and the ensuing task of grouping them into classes or series, organisations have to utilise records management. Through records management, organisations are able to evaluate the various business processes they transact; identify records which result from each of their activities; and bring the records together into classes to depict each transaction. When citizens shape their requests for access to information they usually relate them to a transaction of an organisation. Through the manuals, citizens are able to identify the records class in which the information they would like to access may be contained.

²⁸⁸ In the UK these are known as publication schemes.

In proclaiming the need for the development of manuals, FOI legislation neither makes reference to records management nor suggests that records management has to be relied on to help identify the record classes, series or categories. For instance, section 14 (1) of the South African FOI law stated that within:

six months after the commencement of this section or the coming into existence of a public body, the information officer of the public body concerned must compile in at least three official languages a manual containing:

(d) sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject.²⁸⁹

Section 15 (1) of the Irish law expressed that:

A public body shall cause to be prepared and published and to be made available in accordance with subsection (7) a reference book containing-

(b) a general description of the classes of records held by it, giving such particulars as are reasonably necessary to facilitate the exercise of the right of access.²⁹⁰

In these examples, there exists an implicit awareness that the potential of an organisation in grouping its information into classes is derived from records management. In other words, records management has the capacity to enable organisations to know the types of information they hold. Records management also has the ability to assist the organisations in grouping the information into classes for ease of identification and reference. It is from the respective classes that organisations become adept at identifying the appropriate records requested for access or for selecting information for proactive disclosures. Building FOI legislation on practicable records management has the incentive of producing comprehensive and informative manuals.

²⁸⁹ South Africa government *Promotion of Access to Information Act*

²⁹⁰ Ireland government *Freedom of Information Act*

- **Obligation to inform requestors if the information sought is held or not**

FOI laws have inbuilt obligations which mandate an organisation which receives requests for access, to inform the requestors if they hold the information being sought. This implies that the organisations are expected to know the information which their records capture so as to undertake this obligation. For instance one UK respondent observed that:

the role of records management is to capture all that information and keep it for an appropriate period of time. It is very difficult to prejudge what is going to be important and what is not going to be important for access. That is why you need a systematic regime that makes sure you capture everything you should keep and you keep it for an appropriate amount of time. I think this is where things will fall apart if you do not have good records management.²⁹¹

Unless good records management is in place, this may hinder the capacity of organisations to know if they hold the information to which access is being requested. Where organisations, through records management, are able to ascertain without much trouble the information they hold, this is proof that once enacted, FOI legislation has the potential of being effective.

- **Responding to requests within prescribed timeframes**

Another obligation which FOI legislation bestows on organisations is to facilitate access to the information sought within a specific timeframe, in some laws it is 20 working days in others 30. Organisations are expected to have located and made the information available within the set timeframe. However, unless “information is organised and maintained in a logical and consistent manner, agencies are likely to assert that they are unable to locate responsive material when a request is received.”²⁹² Ineffective records management will therefore lead to considerable time being wasted searching for the information needed for access and this may well exceed the prescribed timeframe. The ease of identifying records and their subsequent retrieval is made possible by good records management. One UK respondent observed that:

²⁹¹ Personal interview with UK/9, 07/04/04.

²⁹² The Federal Institute for Access to Information in Mexico and a Culture of Transparency, a report for the William and Flora Hewlett Foundation, 2006. Available at <http://www.pgcs.asc.upenn.edu/docs/mex_report_fiai06_english.pdf>. Accessed 24/02/06.

Good records management is essential if you want to comply with the legislation and it is really about finding your stuff. If you can't find it, you can't release it. If basic records management practices are not followed in respect to FOI i.e. keeping things in chronological order, not keeping duplicates and drafts on file, filing all the key documents and the like, making sure they are readable...all the very basic rules of record keeping, can make it difficult to deal with requests if they are not in place.²⁹³

Another UK respondent added:

a public authority is encouraged to assist people in making requests for information and they have to efficiently process requests for information...deal with them within statutory timescales as soon as possible. And that links to good records management. Having good records management provision, having cleared information which is no longer relevant, having clear records management policies, disposal schedules enables information to be found and made available with the timescales.²⁹⁴

Good records management can therefore enable organisations to ensure that they create and retain records in their normal course of business. As made clear in the above quotation, good records management will help organisations in their bid to comply with FOI legislation by ensuring that records are created, properly classified for retrieval and can be found when required for access.

- **Reviews for denied access**

Although FOI laws facilitate access to information, there are times when the access can be denied on various grounds following prescriptions of relevant exemptions. For instance the UK FOI law lists 23 exemptions which can be used to withhold access to information. These include but are not limited to: withholding information whose disclosure is not in the interest of the public e.g. information on the defence, economy of the UK or the country's relations with others; personal information; information which would prejudice conduct of public affairs; and information provided in confidence.²⁹⁵ A UK respondent highlighted that when organisations withhold information, "they start from the premise of wanting to grant access to information

²⁹³ Personal interview with UK/1, 20/11/03.

²⁹⁴ Personal interview with UK/12, 18/05/04.

²⁹⁵ See Part II of the UK FOI legislation.

and then withholding the information if there is a clear reason for doing so within the terms of exemptions.’²⁹⁶

The denial of access is however is not cast in stone and can be contested. A requestor for access can appeal against the denial, and an organisation can also contest against decisions mandating it to avail access to certain information. In order to sustain the denial or overturn it, there is a need for access to the contentious information and to the recorded decisions which forbade the access. Through records management, the decisions relating to the denial will be accessible including the records whose access is contested. The incentive to record and maintain the decisions of the denials, and the ability to identify and retrieve the contested records for adjudication, shows that FOI legislation built on good records management is likely to be more effective.

Good records management is invaluable for an effective FOI regime. Apart from supporting organisational compliance with the legislation, good records management depicts the ability and the commitment of an organisation in implementing a legal right of access. Without effective records management, FOI legislation is likely to suffer from information which cannot be found or is found outside the prescribed time limits. Further, the manuals which will have been published may not be helpful in enabling citizens to identify the records they may wish to access.

5.5 Some emerging hypotheses from implementing access to information through FOI

Three interrelated hypotheses emerge from the implementation of access to information through FOI legislation. The emergence of these hypotheses is derived from the employment of the grounded theory theoretical framework discussed in section 3.2.1. In the application of the grounded theory, this study did not seek to test any preconceived theory or hypothesis but has instead unearthed these hypotheses to

²⁹⁶ Personal interview with UK/12, 18/05/04.

aid in the development of inductive explanation of the importance of FOI legislation. The first of these hypotheses, states that FOI legislation enhances responsible government. The second suggests that owing to FOI legislation, clearer and viable information networks are created. The last argues that by means of FOI legislation citizens can become more aware of the relationship they share with government, and further be able to understand better the roles they are expected to play in the governance process. The causal effect of each of these hypotheses on one another is the creation of a democratic process where citizens determine the type and the level of their democratic engagement.

5.5.1 Hypothesis one: FOI has the capacity to enhance responsible government

Governments which are thought to be responsible are normally taken to be democratic, accountable and trusted. Of late, governments possessing these qualities are also taken to have good records management to support these three aspects. Adding FOI legislation to a government which possesses these qualities results in a governance process which is honest, thereby enhancing the responsiveness and the responsibility ascribed to that government.

The previous section of this chapter has shown that underpinning democracy, accountability, trust and records management is access to information. No matter the openness that a government may attain, if FOI legislation is absent, this openness is limited only to the information which government makes available through its discretion. Hence, the responsiveness and the responsibility which may be ascribed to a government will only be in tandem to the information it has found safe to release. By adding FOI legislation to this environment, a government's responsibility and responsiveness is enhanced. On the one hand, access through FOI legislation enables citizens to be more abreast with the functions and activities of government. And through this, citizens are better placed to contribute to the execution and to the improvements of the functions and activities of government. On the other hand, government is likely to receive information from citizens which can influence and enhance the governance process. Governance is not static and variable information

from citizens can aid in shaping its direction and contribute to its maturity. A responsible government predicated on FOI legislation also has the capacity to build insight into varied societal, political and economic expectations. Not only does government become more responsible through FOI but it is also seen as honest in its undertaking of public affairs. It is honest because it is accountable and the accounts can be verified through a liberal and defined access to information.

Governments can be responsible without FOI but the legislation enhances this status and takes it onto a new level where access to information is governed and predicated on achieving more openness of the governance process. Although many open governance initiatives may exist, the adoption of FOI legislation improves access to information thus effectively enhancing responsible government. Where FOI legislation has not been adopted, as in Botswana and Malawi, responsible government and its potential to attain better openness is limited and is restrained by limited access to information. Once FOI legislation has been adopted, access to information becomes liberalised thus augmenting the already responsible governance in place.

5.5.2 Hypothesis two: FOI has the capacity to generate clearer and viable information networks

In this hypothesis, the term ‘information networks’ refers to the different modes which enable citizens to gain access to information. Access to information is founded on the understanding that networks which can convey the information are available, and that they should support and work together. Since access to information experiences variable access demands shaped by varied interests, and it is based on access times which are convenient to individuals or groups, the networks should be flexible to accommodate these differences.

Access to information through constitutional guarantees has fewer and less viable information networks. For instance, by having determined what it feels people need to know, government also decides on the networks it feels are convenient to facilitate access. There is never a guarantee that a network which government used today will be in use again tomorrow, and whether they effectively propagate the

access expected of them. This indicates that the networks chosen by government are in competition with one another, and they are also utilised based on the objective which the government would want to achieve through making information accessible. Hence, government will only use the network which it feels has the capacity to convey broadly the information chosen for disclosure.

The adoption of FOI legislation introduces other information networks as well as formalising those already in existence. Through these networks, citizens can determine the information which they want to access and select the best network which would facilitate the access. At other times, citizens may opt to passively gain access to information thus empowering government to select the best network or a combination of them, in facilitating the access. FOI legislation creates distinct information networks which provide citizens and government with viable methods which they can utilise when gaining access to information.

5.5.3 Hypothesis three: FOI has the capacity to raise the awareness of the relationship citizens share with government

The relationship citizens share with government and the roles which citizens are expected to play in the governance process are mostly formulated and understood through access to information. Where access to information is restricted, the relationship between citizens and government is confined to the information which will have been released into the public domain. If access is made more liberal after FOI legislation has been adopted, and information networks are viable to accommodate varied access requirements, citizens are positioned to know and better understand the relationships they share with government and their implications.

Citizens are the most important constituent of government, hence their consent and participation in governance is crucial. Therefore, the information and the scale of its access can contribute immensely to the knowledge of the governance process and subsequently lead to the better understanding of the relationships between government and citizens. Access through the guarantees inhibits the growth and the development

of these relationships since the scale of the relationships is restricted by the control which government has over access to information.

Through a dynamic and a more liberal access to information regime which FOI legislation brings about, citizens' access to information is improved. Hence, citizens become more aware of the intricacies of the governance. As a result, citizens are able to discern their role in the governance process, and are better able to act as check and balances of government.

These three hypotheses are interrelated. For instance, the capacity of FOI legislation in enhancing responsible government leads to the development of clearer and viable information networks. Consequently, this will lead to citizens understanding better their relationships with government. If it is assumed that the principal hypothesis is the capacity of FOI legislation in generating viable information networks, the other two will always follow.

5.6 Conclusion

Access to information is very fundamental and limiting its implementation to constitutional guarantees inhibits its full utilisation by citizens. Although constitutionally underpinning access to information is indispensable, the fundamental nature of the right mandates the creation of a practical environment capable of supporting and enhancing access.

Once access to information becomes functional and practical, the failures of the guarantees in enabling direct access to information are corrected. This does not intimate that the guarantees are worthless, but that they are fundamental and have to be made operational for all to enjoy. However, implementing access through FOI legislation necessitates the existence of certain ingredients capable of creating an effective access environment. First, democracy has to exist. Since democracy is premised on access to information, it offers FOI legislation with a solid foundation from which it will regulate and implement a functional access regime. Next is accountability which also shows the reliance of government and citizens on access to

information. In terms of accountability, FOI legislation can create a more diverse access network which will work towards enhancing the performance of the public sector. Through the trust which citizens can develop on government, FOI legislation is able to build an effective access framework which will enhance the trust. Functional and effective FOI legislation also encourages government to be more responsible and thus generate a governance process which is honest and fair. Through good records management, government creates an assurance that it will document its various activities and it will further retain this information and facilitate direct access to it.

Through the application of the grounded theoretical framework, three hypotheses have been unearthed to help explain the importance of FOI legislation. Although the hypotheses are hinged on FOI legislation, they are also premised on good records management. FOI will enhance the capacity of government to be responsible; it will create clearer and viable access networks; and it will promote defined awareness of the relationship citizens share with government, only when there is information to access to support, prove and verify these processes. Since the creation, management and availability of information is derived from records management systems, these hypotheses are equally applicable to records management processes. As the next chapter will show, records management and FOI legislation share a number of commonalities. As a result, when these hypotheses are to be tested in future studies, the functionality of records management should not be overlooked.

Chapter 6: Records management and FOI – the relationships

6.1 Introduction

It is no longer sufficient for governments to claim that they are doing things in the right way when they cannot produce evidence to back up their claims. Governments are also wary of growing scepticism and proactive questioning by citizens who want to know the truth behind claims made by government. To citizens, the word of government is no longer the ultimate truth but they want evidence that what government is saying is the truth. The avenue for addressing this scepticism is through the adoption of FOI legislation. However, adopting FOI without good records management is likely to affect the capacity of the legislation in creating a viable access to information framework. Access to information through FOI legislation is based on the existence and availability of information. Access is “dependent upon government decisions and activities being recorded in some form as part of the business process and, latterly, valued and preserved as an important corporate resource.”²⁹⁷ Records management therefore is important in the creation and maintenance of information which apart from supporting business processes and the capture of history supports the provision of the access through FOI legislation. At the basic level “if you are not going to keep the records then you are unlikely to be able to deal with FOI requests.”²⁹⁸ This importance of records management towards the provision of access demonstrates that it shares certain relationships with FOI legislation.

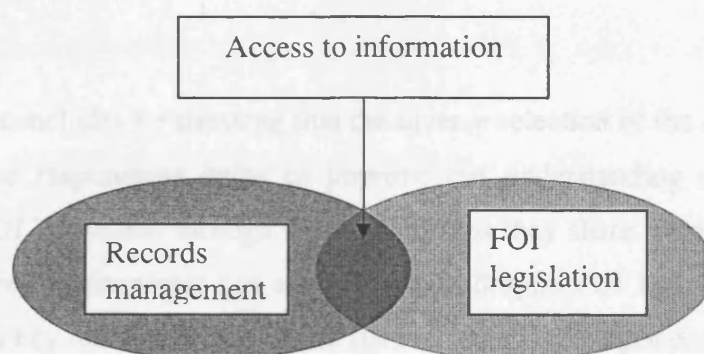
The understanding that records management and FOI legislation share some formal relationships has emerged in both literature and interviews for this study. In the literature, Snell after having carried out an empirical study on the impact of FOI legislation on records management argued that the relationship between the two was

²⁹⁷ J Gilbert and T Karlebach ‘Culture shock? A brief look at the Canadian experience thus far’ (New Delhi: Commonwealth Human Rights Initiative, 2003). Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/canada/jay_gilbert_tanya_karlebach.pdf>. Accessed 12/03/06.

²⁹⁸ Personal interview with UK/9, 07/04/04.

coincidental than causal.²⁹⁹ Some other literature suggested that FOI legislation alone cannot guarantee access³⁰⁰ and others concluded that FOI legislation buttresses the need for good records management.³⁰¹ Both the FOI literature and some of the respondents treat records management as a given i.e. that it exists and it works or that FOI legislation will produce the necessary re-engineering to make records management work. These rarely touch on the issue of the efficacy of FOI where records management is in disarray or in a state of disrepair or its focus is in serving internal needs of the bureaucracy rather than the higher values of accountability and openness. All these indicate that records management and FOI legislation share some relationships. A simple example of this relationship is captured in figure 2 showing that access to information joins the two together.

Figure 2: Simple relationship which records management shares with FOI



However, three categories of relationships have been uncovered from the diverse experiences gained from the case study countries and from respective respondents showing that the relationships are dynamic. The first is a relationship derived from corporate governance. Through corporate governance, government is expected to comply with the good of all its constituents and to achieve this it has to reduce information asymmetries and contain secrecy: records management and FOI legislation are tools towards this end. The second is composed of two interrelated

²⁹⁹ R Snell 'The effect of freedom.' See section 2.4.1.

³⁰⁰ J Gilbert and T Karlebach 'Culture shock?'

³⁰¹ S Edward and J McLeod 'Is the freedom of information act driving records management?'

reciprocal relationships which are complementary and mutual to one another. In these, records management and FOI legislation share certain common objectives and through the two processes co-operating together, they are able to achieve these commonalities. The last batch is the causal relationships which Snell has identified.³⁰² Section 6.3 of this chapter builds upon Snell's work by looking at the causality beyond a single case to many case countries, some developed, some developing, and some having enacted the legislation and others who have not.

In bringing to the fore the relationships, this chapter also seeks to establish if the relationships are one way or two way; if they have any negative or positive aspects; if they have any interrelatedness, and the costs and benefits consequences where they arise; and discusses the relationships within the perspective of the hypotheses unearthed in section 5.5. The chapter also discusses the implications of the relationships to the provision of access to information and for the management of records.

The chapter concludes by stressing that the diverse selection of the case study countries and of the respondents helps to improve our understanding of records management and FOI legislation through the relationships they share. However, two things remain: records management has a key function despite FOI legislation, and FOI legislation has a key function whatever the state of records management.

6.2 Corporate governance relationship

Corporate governance is a diverse discipline whose concern is the management of institutional processes.³⁰³ The Australian National Audit Office defined corporate governance as "processes by which organisations are directed, controlled and held to account."³⁰⁴ According to the Organisation for Economic Co-

³⁰² R Snell 'The effect of freedom.' See section 2.4.1.

³⁰³ S Turnbull 'Corporate governance: its scope, concerns and theories' *Corporate Governance* 5:4 1997(Blackwell Publishing): 180-205. Available at <http://www.ingentaconnect.com/content/bpl/corg/1997/00000005/00000004/art00061>>. Accessed 09/03/06.

³⁰⁴ Australia Government, Australian National Audit Office *Public sector governance, volume 1: better practice guide-framework, processes and practices* (Canberra: Commonwealth of Australia, 2003). Available at [http://www.anao.gov.au/WebSite.nsf/0/39e5ae748f6f9749ca25706f000689fc/\\$FILE/Public%20Sector%20Governance%20Vol%201.pdf](http://www.anao.gov.au/WebSite.nsf/0/39e5ae748f6f9749ca25706f000689fc/$FILE/Public%20Sector%20Governance%20Vol%201.pdf)>. Accessed 05/06/06.

operation and Development (OECD) corporate governance comprised six principles:³⁰⁵

- Responsibility for an effective corporate governance framework;
- Rights of all shareholders and clear ownership functions;
- Equal treatment of all shareholders;
- Clear and functional roles of shareholders in corporate governance;
- Disclosure of information and transparency of the governance process;
- Responsibility of the board.

Anthony Willis, a partner in the Phillips Fox Solicitors in Canberra, Australia, opined that the requirements of corporate governance are as follows:

- Due process- doing things in an agreed, documented, controlled and appropriate way;
- Transparency- doing things in a way which is open to appropriate scrutiny;
- Accountability- having to answer for things one does;
- Compliance- having systems to ensure that things are done properly;
- Laws- meeting applicable legal obligations; and
- Security- having systems to ensure protection of information.³⁰⁶

Although corporate governance is normally associated with the governance of firms, it is used here within a government-citizens framework. In this framework, corporate governance suggests that government has been given the responsibility to govern (they are the board) on behalf of the citizens (shareholders). As a result, government is expected to put into place a practical framework which clearly spells out its processes and the modalities for achieving them, as well as stating how it will account and be held to account by citizens.

³⁰⁵ Organisation for Economic Co-operation and Development (OECD) 'OECD principles of corporate governance' (Paris: OECD, 2004): 17-66. Available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> >. Accessed 08/02/06.

³⁰⁶ A Willis 'Corporate governance and management of information and record.' *Records Management Journal* 15:2 (2005): 86-97.

Corporate governance therefore suggests that government is expected to be transparent in its dealings with and on behalf of citizens. Government has to account to citizens for its performance and it has to have in place measures which citizens can use to hold it to account. The 2003-04 report *Recordkeeping in large commonwealth organisations* released by the Australian National Audit Office, argued that records management “is a key component of any organisation’s good corporate governance and critical to its accountability and performance.”³⁰⁷ The same report continued that “sound recordkeeping can assist an organisation’s performance by: better informing decisions; exploiting corporate knowledge; supporting collaborative approaches; and not wasting resources, for example by, unnecessary searches for information and/or redoing work.”³⁰⁸

Implicitly, corporate governance hinges on two things: good records management, and access to information. Good records management captures information and evidence of business so as to enable organisations to provide proof of being transparent; to enable them account and be held to account; and to be able to prove that they transact all public affairs within the confines of the law. Access to information, especially by virtue of FOI legislation, enables citizens to ascertain the level of transparency of organisations. It also affords citizens with the opportunity to hold organisations accountable for their performance as well as to enable them to evaluate whether all the organisational functions were conducted within the ambit of the relevant laws and regulations.

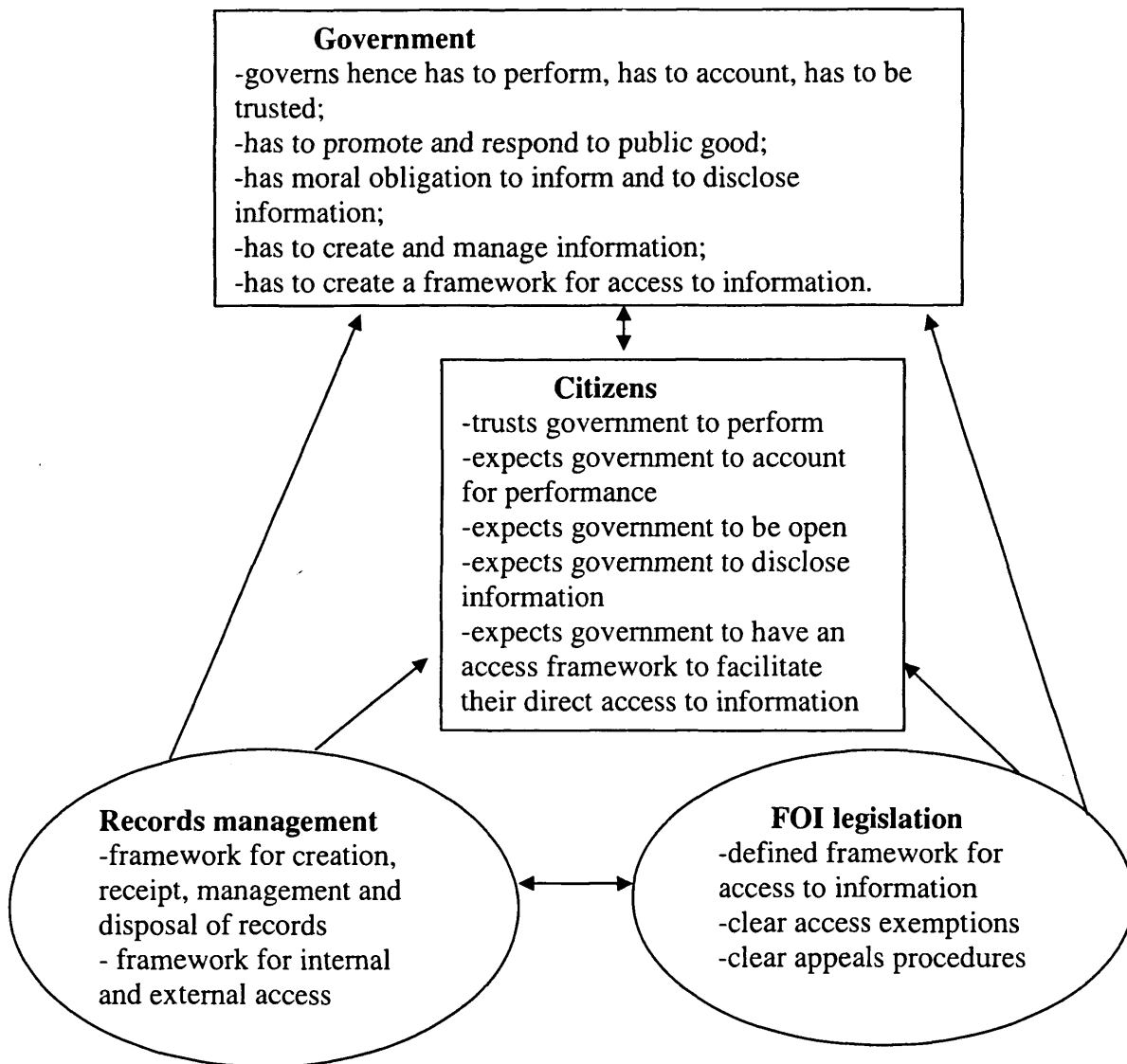
Corporate governance brings records management and FOI legislation into some form of relationship. As figure 3 below shows, when governments take over the responsibility to govern, they directly or indirectly promise to perform to their utmost in handling public affairs. Therefore, as they transact public functions, governments are expected to proactively account and to enable citizens to hold them to account. Also, it is expected that governments will inform citizens on the due processes of public functions, and to enable citizens to seek and to gain access to records and other

³⁰⁷ Australia Government, Australian National Audit Office *Recordkeeping in large commonwealth organisations* (Canberra: Commonwealth of Australia, 2003). Available at <<http://www.anao.gov.au/website.nsf/publications/478b4a27724e193bca256da50074796c>>. Accessed 05/06/06.

³⁰⁸ Australia Government, Australian National Audit Office *Recordkeeping in large commonwealth organisations*

information which may help them understand the processes undertaken and the accounts made. However, government can only apprise citizens of its performance if it creates and manages records.

Figure 3: Corporate governance based relationship between records management and FOI



Through FOI legislation government enables citizens to hold it to account without waiting for it to account to them. Citizens can make enquiries into the different aspects of governance and FOI legislation enables them to gain direct access to the records which answer their queries. As Willis observed “the records held by an

organisation are what make it possible for people who have a right or obligation to know what has been done, to see exactly what has been done and how it has been done.”³⁰⁹

Clearly, the relationship which good records management shares with FOI has the capacity to enhance corporate governance. This is in line with the three hypotheses raised in section 5.5. Where a government utilises corporate governance predicated on both good records management and FOI legislation, chances are that it may become more responsible. One UK respondent observed that “the absence of good records management can endanger confidence in organisations and that has the potential to damage its image.”³¹⁰ Therefore, if governments are unable to maintain and operate good records management programmes, it is unlikely that they will be transparent and accountable, let alone be able to prove that due process is followed when carrying out public functions. Where good records management is lacking, “it might mean that the information which records capture will be difficult to find. When organisations cannot find records and the information they capture, rights of access which FOI aims at enforcing are of little use.”³¹¹ Where good records management exists and FOI legislation is effective, governments can prove their responsiveness to citizens through being transparent and through their ability to account and to be held to account by citizens.

The relationship which records management shares with FOI under the auspices of corporate governance can also lead to clearer and viable information networks. On the one hand the networks develop within government. That is, government agencies start seeking to know more about the records which similar agencies create and hold. They seek to understand how the records are held and how they are accessible both internally to respective public servants and to public oversight bodies like the Auditor General. In this regard, organisations are able to “distribute the burden of compliance to FOI and the management of records among their staff. This therefore becomes a shared responsibility.”³¹² Hence, once compliance to FOI legislation and the management of records become a shared

³⁰⁹ A Willis ‘Corporate governance and management of information and record.’

³¹⁰ Personal interview with UK/9, 07/04/04.

³¹¹ Personal interview with UK/4, 30/01/04.

³¹² Personal interview with UK/10, 10/04/04.

responsibility among staff of an organisation, the public service will develop clearer networks through which staff can access information.

On the other hand, further viable information networks will develop between citizens and governments. Where governments observe their obligation to inform citizens, and where citizens can actively call upon governments to account, formal access to information networks are created. Once governments know that citizens have the liberty to seek direct access to records, they will create within the public service procedures which will make this possible. Citizens too, in utilising the right which FOI bestows on them, will always seek to explore the various access to information networks which the legislation will have developed for their use.

When records management and FOI legislation converge to enhance corporate governance, the relationships which citizens share with government become more explicit and are always subject to refinement. From this perspective, access to information is no longer a sole privilege for government since citizens can seek and can gain direct access to the information which serves their varied needs. Through good records management, government is more likely to succinctly record and inform citizens of what it does and how it does it. By virtue of access to recorded information, citizens are also likely to make out the levels of the relationship they share with government and determine the depth of their involvement in all matters of governance. In this respect, public servants are likely to develop the preference for transparency and accountability. They are also likely to enhance the capacities of government's obligation to inform citizens and to create an accommodative atmosphere which will encourage direct access to official information. Hence, through corporate governance, records management and FOI legislation elucidate and strengthen the relationships which government and citizens share.

It is anticipated that countries which have enacted FOI legislation and have good records management are more likely to perform better in corporate governance than those without the legislation. In these countries, access to information is not premised only on the information which government wants the citizens to know but a framework will exist to enable citizens to inform themselves through gaining direct access to information. The expectation is that good records management will exist to

capture the business processes and will also make the information available for access. This cannot be concluded for Botswana. Even though Botswana, as section 1.3.2 shows, has tried to streamline records management activities under BNARS, citizens do not have direct access to records and other official information save for that archival in nature.³¹³ Therefore, access to the information is through the discretion of government. This setup works against efficient corporate governance since information asymmetries are retained.

Flinders observed that information which government releases proactively is unlikely to be the sort which citizens may want to access through FOI legislation.³¹⁴ The United Nations Development Programme (UNDP) in their *Access to information, practice note* of 2003, argued that a government's discretion to release information into the public domain is done "without understanding the needs of the users, or the contexts in which they can access and use the information."³¹⁵ Access to information following this model is not demand driven and will be inappropriate to the individual needs of citizens.³¹⁶ In corporate governance, it is crucial for citizens as shareholders in governance to be afforded the opportunity to validate the information which government makes available proactively. In this respect, any developments which the government of Botswana may embark on in improving the management of public sector records will be for the benefit of government alone due to the absence of FOI legislation. The adoption of FOI legislation in that country will enable citizens to validate the information which government releases to them hence, enabling them to benefit indirectly from good records management.³¹⁷

Theoretically, Malawi might be expected to perform far much better than Botswana in terms of corporate governance considering the conciseness of its constitutional guarantee on access to information. However, because of the failures of the guarantees discussed in Chapter 4, the Malawi government will not be able to

³¹³ See chapter 7.

³¹⁴ M Flinders *The politics of accountability in the modern state* (Aldershot: Ashgate Publishing Ltd, 2001): 320.

³¹⁵ United Nations Development Programme *The practice note on access to information* (Oslo: United Nations Development Programme, 2003): 4. Available at <<http://www.undp.org/policy/docs/policynotes/a2i-english-final-4649027220103883.pdf>>. Accessed 05/05/06.

³¹⁶ United Nations Development Programme *The practice note on access to information*: 4.

³¹⁷ M Flinders *The politics of accountability*: 320.

effect any greater improvements to corporate governance without the adoption of FOI legislation. The other factor which will work against Malawi is the state of records management. Records management in that country is poorly resourced to support effective business processes and at the same time to provide for further external access to information by citizens.³¹⁸ As section 6.2.1 and 6.4.2 present, once Malawi adopts FOI legislation, records management in that country may improve substantially.

6.2.1 Culture change

One of the concerns of corporate governance is for governments to attain higher levels of transparency and to be more responsible to citizens. The ability of governments to become transparent and responsible is driven by good records management and is supported by a framework which will keep citizens informed about the governance process. Although these are just expectations, some governments are known to be less open while others are more open. The adoption of FOI legislation predicated on good records management has the potential to reverse the secrecy which some governments are known to have institutionalised. Any attempt by a government to move away from a culture of secrecy to openness through FOI legislation will be incapacitated if records management is weak. A weak records management system will hinder the culture change in that a government may experience difficulties in accessing records from which it can extrapolate information for proactive disclosures. Where the information is accessible, it may be incomplete or may be strewn across many unrelated files making repackaging information for the disclosures complicated. A weak records management system will also make it difficult for a government to verify whether it holds certain information when a request is made for its direct access.

In a corporate governance polity which is secretive or where secrecy is predominant, access to information and records management operate differently. As table 1 show, access to the records which a secretive government creates and holds, is restricted and limited mostly to public servants and the executive branch of government. Even amongst the public servants, access to the records will be restricted

³¹⁸ Personal interview with MAL/1, 09/08/04.

depending on their levels of sensitivity. In a polity which is open and transparent, good records management and FOI legislation can collaborate to enhance corporate governance.

Table 1: Records management functions in secret and open governance environments

	Secret	Open
Access	Restricted, limited, uncontested	Lesser restrictions, fewer limits, contestable
Audience	Internal to government	Internal to government and external to citizens
Information flows	Static	Dynamic

Even though secretive governments may improve the quality and capacity of records management, access to the information which the records capture will remain uncontested and will be made available internally to government. Secrecy, Stiglitz observed, gives those in government exclusive control over public knowledge.³¹⁹ Sections 1.2.1 and 1.2.2 have argued that records provide information and evidence of business transactions. Records therefore provide knowledge of a government's business function. If governments have sole control over records, a credible source of corporate knowledge, they are likely to guard against their access. When this occurs, the asymmetries and state secrecy which access to information possesses capacities to reverse will remain intact.³²⁰

Corporate governance based solely on constitutional guarantees on access to information is likely to produce restrictive management of records. Through the guarantees, government prescribes levels of transparency and accountability which it feels are sufficient for its relationship with citizens. By virtue of the fact that the guarantees are pledges showing government's obligation to inform citizens, the creation and use of public records is likely to enhance the secrecy. The records will be created and used with the knowledge that citizens will not gain direct access to them but to the information derived from some of them.

³¹⁹ J Stiglitz 'Transparency in government:' 34-35.

³²⁰ J Stiglitz 'Transparency in government:' 30-31.

Invariably, countries such as Botswana which derive the impetus for access to information solely from constitutional guarantees are likely to create and manage records for the benefit of government than for citizens. That is, armed with the belief that citizens are unlikely to gain direct access to records, public servants in Botswana can adopt a records management approach which may facilitate only informing citizens after government has extracted the suitable information than enabling their direct access. Just like access to information provided through the guarantees, records management becomes static and restrictive. Corporate governance will also remain secretive as a result. Stiglitz warned that:

secrecy is corrosive: it is antithetical to democratic values and undermines democratic processes; it serves to entrench incumbents and discourage public participation in democratic processes; and it is based on the mistrust between those governing and those governed and at the same time exacerbates that mistrust.³²¹

When governments adopt FOI legislation, the complexion of corporate governance will change as secrecy is replaced by more openness and transparency. As some UK respondents argued “FOI creates a move away from the culture that all this information is secret to all this information is open,”³²² “FOI inculcates an openness mentality. Government starts to think about openness and seeks to develop and mould its business base on openness.”³²³ Realistically, the move towards more openness and better transparency is arrived at through enabling citizens to gain insight into the activities of government. Through this process, citizens are to develop thorough knowledge of how a government transacts each one of its activities. Records management documents the execution of these activities and access to the information which the records capture propels any move towards openness and transparency. Clearly, the adoption of FOI legislation can lead to better transparency but transparency can only be proven to function if information exists and citizens can gain direct access to it. Hence, governments may adopt FOI legislation but it will have to be built into good records management so that effective transparency and openness can be developed.

³²¹ J Stiglitz ‘Transparency in government:’ 34.

³²² Personal interview with UK/14, 21/05/04.

³²³ Personal interview with UK/17, 06/01/05.

Consequently, the relationship which records management shares with FOI under corporate governance forces governments to reflect and find ways through which they can improve their performance and trust ratings among citizens. For instance, as governments think of adopting FOI legislation, the thought should be 'are we creating and holding information which citizens can access, even directly?' This thought should then trigger another one, 'are we creating the right records in terms of informational and evidentiary content? Do these adequately inform and provide evidence of what we do? Will citizens understand what they express if they were to access them? Are they sufficient in providing proof of transparency?' Intrinsically, when FOI legislation is considered as part of improving corporate governance, good records management should be thought of as well.

From a corporate government standpoint, good records management and FOI legislation creates an environment where lesser restrictions and limits to access of official information will exist. Added also, there will be an emerging realisation that access is not only limited to a government's desire to disclose information but that it extends to the ability of citizens in gaining direct access to official records. Hence, when a government creates and uses records, it has to do so knowing that citizens may ultimately seek to gain direct access to them.

Although most respondents have shown support for a culture change from secrecy to openness, the corporate governance relationship between records management and FOI legislation has cost-benefit implications. Cost-benefit analysis is an economics tool utilised to decide whether or not to make a change, or whether or not to do this rather than that. In abstract terms, cost-benefit analysis is a tool which is used to determine if things that have to be done are worth undertaking. The benefits of any anticipated project are set in monetary terms and from this the actual cost of the project is subtracted. If the benefits are higher than the cost, the project is worthwhile.³²⁴ Gramlich maintained that:

government is not an entity separate from its citizens, but really the collective expression of the will of citizens. The benefits and costs

³²⁴ E M Gramlich *A guide to benefit-cost analysis* 2nd edn. (Englewood Cliffs, NJ: Prentice Hall, 1990): 1-8; D W Pearce and C A Nash *The social appraisal of projects-a text in cost-benefit analysis* (Basingstoke: Macmillan Press, 1993): 1-4.

of some government project are then not the increases or decreases in government revenues but the gains or losses to all members of the community.³²⁵

Pearce and Nash added that the cost-benefit analysis is not limited only to deciding whether or not to carry out something for the benefit of an individual but relates to issues that affect the welfare of citizens.³²⁶ Cost-benefit analysis is a value judgement which government has to employ when determining whether projects will have benefits for citizens.

It is from this perspective that the relationship of records management and FOI legislation towards culture change is to be understood. The cost of introducing FOI legislation might be phenomenal in that a new framework for access has to be introduced, and that the potentially embarrassing secrets may become known. Part of the problem of determining the costs and benefits of introducing FOI legislation is two-fold. Costs for implementing FOI in a jurisdiction are normally known or can easily be estimated. For instance, Roberts observed that in 2004 the Australian government had estimated that implementing the legislation cost the country \$14 million while for the United States (US) it stood at \$323 million in 2003.³²⁷ The other cost which can also be estimated is the 'chilling effect' of openness which FOI brings about. When public servants fail to create records or destroy them so as to avoid their access or disclosure, this effect can be calculated. However, the benefits of FOI legislation are hard to quantify. Although enacting FOI legislation maybe costly in terms of the reputation of government, the benefits will surely outweigh the cost of denying access to information. The benefits of the legislation are cumulative across the citizenry. These therefore will result in the development of a more open governance process, and the existence of informed and constructive debates.

The same applies to records management. The cost of setting up a records management system can be calculated or estimated with ease. For instance, the costs of filing cabinets, file folders, man-hours to design classifications schemes and

³²⁵ E M Gramlich *A guide to benefit-cost analysis*: 4.

³²⁶ D W Pearce and C A Nash *The social appraisal of projects*: 5.

³²⁷ A Roberts *Blacked out: government secrecy in the information age* (New York, NY: Cambridge University Press, 2006): 113-114.

retention schedules and so on, can be calculated in monetary terms. The costs of records not being created when they should have, their misfiling and the inconsistent application of retentions schedules is calculable. The benefits of good records management are however difficult to quantify and express in monetary terms. Nonetheless, a good records management system will ensure that the transactions which an organisation is engaged in are recorded and the information is held and retrievable.

The UK, Ireland and South Africa are better placed to effect viable culture change in corporate governance. However, if these are just content that they have enacted FOI legislation and do nothing to enhance the management of records, the access which the legislation regulates will be difficult to achieve. Apart from ensuring that the records are in existence for purposes of business functionality, records management ensures that the information which records capture can be used for compliance on access. The benefits of FOI in culture change need the support of good records management. With the support of good records management there is assurance that records and information will be made available when needed for FOI. As one Malawi respondent observed: "FOI is a good development for Malawi but our current approach to records management may not make information available when needed for compliance to the legislation."³²⁸ This observation is an indication that any culture change towards more openness and/or transparency becomes realistic only when information exists and is accessible.

As for Botswana, the costs for having not legislated FOI will continue to be higher. The benefits which citizens can enjoy from access to information will be limited to the information which government finds safe for citizens to access. Although the government through BNARS may be working hard at improving records management, the benefits will be felt by government alone. The absence of FOI means that citizens do not have direct access to records unless they are archival and hence cannot indirectly benefit from records management. In 2003, when the then Minister of Science, Communications and Technology associated the non prioritisation of FOI to costs of implementing the legislation, he was also revealing the fear of the

³²⁸ Personal interview with MAL/2, 09/08/04.

government in losing control over official information. The costs which the Minister alluded to are enhanced by the growth in state secrecy and the asymmetries. The solution is to have these offset by the benefits which both government and citizens can derive from the adoption of FOI legislation.³²⁹ The failure to adopt FOI legislation denies the government to benefit from the alternative modes of accountability which citizens are likely to develop under FOI.³³⁰

The capacity imbued in the relationship of records management and FOI legislation to create culture change in corporate governance signifies the essence of the three hypotheses discussed in section 5.5. Effectively, where governments can showcase transparency, openness and accountability by enabling citizens to gain direct access to records, this demonstrates their willingness to be responsive to citizens. The enactment of FOI legislation which is predicated on good records management further enables government agencies to develop intra-government information networks through which access to information will be standardised.

Once citizens become aware of an added possibility of gaining direct access to official information, they become more aware of the relationship they share with government. Through access, they develop knowledge of how public decisions are made, how their taxes are put to use including appreciating the functionality of the entire governance processes. By accessing the records held by government, citizens also develop an understanding of how public information is captured, used and managed. The relationship between records management and FOI legislation therefore enables citizens and government to relate much better.

6.2.2 Risk management

Risk is a phenomenon which is prevalent in the corporate governance environment. Citizens undertake risks when they cede power to others to govern on their behalf. In view on this, O'Malley advised citizens to:

develop some ways of analysing the governmental or political implications of the various forms and combinations of...risks. These

³²⁹ See section 1.3.1.

³³⁰ M Flinders *The politics of accountability*: 309.

analyses would include examining the diverse ways in which risk...might shape the kind of subjects we are to be made into; the practices through which we will be expected to govern ourselves; and the ways we will be expected to imagine the world and prepare for the future.³³¹

When citizens empower government to govern, they do so with the expectation that government will manage and abate all governance risks which are likely to affect them. However, governments also are faced with risks when they accept the responsibility to govern. They are faced with risks of having accepted to govern. They are also facing further risks for having to identify and manage risks. Management of risks in corporate governance presupposes three things. Firstly, government should disclose information which will enable citizens to understand the risk management process. Secondly, government has to create a viable access to information framework which will enable citizens to inform themselves about the risks of governance. Lastly, government has to ensure that good records management exists to ensure that the information about the risks and their management will be created and will be accessible when required.

Risk management refers to the strategies which government employs to identify the threats to its survival and that of citizens, and to devise methods to control and manage them.³³² These strategies become effective when facilitated through access to information. However, access to information on the risks and their management is dependent on their capture as records. According to one UK respondent “the absence of records and information which identify and manage the risks can endanger confidence in the organisation and has the potential to damage its image...the absence can also lead to loss of public trust.”³³³ Realistically, no democratic government will want to lose the confidence which citizens and other stakeholders have in it because if it happens, it has lost their trust. Thus government will do all in its power to retain the confidence and the trust which it has been given.

³³¹ P O'Malley *Risk, uncertainty and government* (London: The GlassHouse Press, 2004): 7.

³³² A Egbuji 'Risk management of organisational records.' *Records Management Journal* 9:2 (1999): 93-116.

³³³ Personal interview with UK/12, 18/05/04.

Table 2 below shows that the capacity of risk management differs according to the levels of openness permeating corporate governance as well as the strengths of records management. Where governance is secret and closed and it is premised on weak records management, the chances are that the knowledge of potential risks and their subsequent management will be limited. This will arise from the absence of the comprehensive capture of all the relevant risk related information. When this happens, appropriate plans for managing the risks will be known more to government than citizens. The reason behind this is that when FOI legislation has not been adopted citizens have to rely on government to inform them about potential risks and their management. Since information asymmetries will exist in this setup, government will release limited information thus denying citizens access to comprehensive knowledge on risk management. Even within the corporate governance structure, access to information on risk management will be discriminatory. The existence of the asymmetries means that the higher some one is in the governance bureaucracy, the more informed one will be. The inequitable knowledge about the potential risks and their management makes risk management difficult.

Table 2: comparisons of risk management in secret and open environments

	Secret (No FOI, weak records management)	Partly open (good records management and no FOI)	Partly open (weak records management and FOI)	Open (good records management and FOI)
Knowledge of risk	Limited	Less limited	Less limited	Diverse
Capacity to mitigate risk	Limited	Less limited	Less limited	Dynamic
Audience	Government (more) and citizens (less)	Government (more) and citizens (less)	Government (more) and citizens (less)	Government and citizens
Effects of risk	Highly significant	Significant	Significant	Less significant

The other problem emanates from weak records management. Records management as section 1.2.4, has shown, is responsible for ensuring that corporate governance creates records and is able to use them. When records management is

weak, corporate governance may be too debilitated to capture risk related information. Risk management which is premised on weak records management can suffer from the failure of corporate governance to record risk information or to locate it when required. As a result the capacity to manage risks will be limited inside and outside government. Internally, government may be unable to access complete records to enable mitigation against the risks. Externally, citizens may not be adequately prepared for potential risks because the information which government discloses may be incomplete and unhelpful.

The danger with this setup is that citizens are never fully abreast with corporate governance and never fully understand their expected roles in risk management. For instance, if government undertakes studies which show that a volcano is likely to erupt in a certain locality but does not involve citizens or share adequate information of the potential risks with them, chances are that some may refuse to move to safer areas when requested to do so. What this example illustrates is that risk management in corporate governance demands the involvement of both citizens and government. Where government excludes citizens in the assessment of risks and seeks to impose risk decisions on them, their full cooperation may be difficult to come by.

When corporate governance is partly open and is supported by good records management but without FOI legislation, the knowledge of the potential risks will be less limited. Under this setup, government because of its commitment to openness is obliged to inform citizens about potential risks and the plan it has devised to address them. The onus is on government to decide how and with what it intends to inform citizens. The strength with the setup is that good records management will exist, and as a result, government will have adequate resources from which it can source out and repackage information for disclosure. The knowledge and the capacity to know and manage the risks will be skewed in favour of government. That is, government will endeavour to inform citizens but it will be hesitant to allow direct access to records which are current to its business processes.

Corporate government structures which are partly open and have adopted FOI legislation but with weak records management systems will have poor risk management capacities. The adoption of FOI legislation will promote the right of access to information but with weak records management, there will be no guarantee that information will exist for it to be accessible. It is likely therefore, that when citizens request to gain access to records, they will be incomplete or difficult to retrieve, and may not provide adequate knowledge on the probable risks. Since the risks will be relatively unknown, their management may prove cumbersome, and their effects could be significant.

Where corporate governance subscribes to openness which is supported by good records management under the auspices of FOI legislation, the environment created will aspire to adequately assess potential risks and to record them. In recording these, governments will have gauged the importance of capturing the risk management process as records against not doing so. They will have also weighed the importance of the records in helping them inform citizens against not having the records. Further, governments will have evaluated with precision the validity of the risks and would have tied these to the timeframe in which the records will be relevant for risk management.³³⁴ However, the ability of open governments in managing risks emanates not only from their strength in records management and their capacities in extracting information for disclosures. It is also based on the ability of citizens to freely access these records. When citizens are allowed direct access to these records, apart from gaining better knowledge of risks and their management, they are likely to uncover other risks which government may have overlooked. Direct access to information by citizens will also help governments to improve the strategies they would have devised for risk management.

Clearly, the reliance of risk management on good records management and FOI legislation has necessary capabilities to enhance corporate governance. Records management ensures that the importance of capturing risk related records is a shared responsibility within the bureaucratic structure. It thus provides an assurance that all the records which are necessary for risk management will be created and will be held

³³⁴ E Shepherd and G Yeo *Managing records*: 102-103, 161-162.

by the organisation. FOI legislation will ensure that citizens are not passive participants of risk management. Instead through the right of access, citizens are active participants since they will not only wait for government to inform them but they can request to be given direct access to records.

Risk management differs across the case study countries. Risk management in Botswana differs from that in Ireland, Malawi, South Africa and the UK. By having implied access to information in the constitutional guarantee for freedom of expression coupled with the absence of FOI legislation, risk management in Botswana is limited. Despite the attempts which the government has made at improving public sector records management, asymmetrical knowledge of risks is prevalent in the country. The absence of FOI legislation provides the government of Botswana with the power to determine which risk management information citizens ought to be informed about. Through this power, the government has created information networks which are inflexible and also deny citizens access to official information which will not have been disclosed.

Malawi, despite its explicit constitutional guarantee on access to information will continue to share similar risk management experiences with Botswana until its FOI Bill has been adopted as law. Just like in Botswana risk management processes may be captured as records, but the citizens of Malawi will still rely on government to inform them. The absence of FOI legislation means that citizens cannot gain direct access to the records on the assessments made on the risks including the plans developed to manage them.

Since citizens of both Ireland and the UK can gain direct access to recorded information on risk management, their knowledge just like that of both governments will be diverse and dynamic. However, risk management in South Africa can surpass the ones incumbent in these two countries since when citizens can not gain access to risk related information through FOI legislation they can evoke the constitutional guarantees on access. The duality of the access provisions makes direct access to records and information in South Africa much more feasible.

This digression is not intended to suggest that risk management is only applicable where management of public sector records management is good and where FOI legislation has been adopted. It stresses that risk management as an important process of corporate governance, will benefit immensely from both FOI legislation and good records management. Good records management will enable government to create and manage information sufficient to support and execute the identification and control of the risks. Through FOI legislation, viable information networks will enable government and citizens to work together in risk management.

6.2.3 Accountability management

Accountability is another important characteristic of corporate governance. When governments accept the responsibility to govern, they are accepting also the obligation to account for their performance and actions. The accountability of government is predicated on the transparent transaction of governance. As the report of the Gomery Commission which was set up in 2004 to investigate allegations of corruption in the government of Canada observed, the “best managers are those whose administrative practices are transparent and who accept that they are accountable not only to their superiors but also to the stakeholders...”³³⁵ The Canadian Information Commissioner, John Reid added, there “can be no true accountability, or true disincentive for corruption and maladministration, without bright light of transparency.”³³⁶ Hence, accountability in corporate governance is founded on transparency but transparency is achievable where activities of government are recorded and there is practical access to this information.

Corporate accountability is strengthened by two things. First, there is a need for good records management to record and make available information and evidence to facilitate creation of the accounts and for their verification. As a UK respondent argued, the obligation to account compels government agencies to “understand their

³³⁵ Canada Government, J H Gomery *Commission of inquiry into the sponsorship program and advertising activities: restoring accountability-recommendations* (Ottawa, Ont: Publishing and Depository Services, 2006): 177-178. Available at <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase2report/recommendations/cispaa_report_full.pdf>. Accessed 12/06/06.

³³⁶ Canada Government, Information Commissioner’s Office ‘Remarks to the managing government information 4th annual forum-Federal access to information at the crossroads, a commissioner’s perspective.’ Available at <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intSpeechId=125>>. Accessed 12/06/06.

business inside out. Employees are resolved to map out business processes and determine what records are created, when and where they should fall off.”³³⁷ Second, since accountability presumes transparency, the records which will have informed the creation of the accounts or the information in them should be disclosed or be made available for access by citizens.

Table 3 below shows that the capacities and effects of corporate accountability differ according to the openness of the polity within which they operate. As the table indicates, secret governments have closed systems of accountability compared to those that are open. Even in those that are open, those without FOI will be less open than the ones which have adopted the legislation.

Table 3: Comparison of accountability management in secret and open environments

Corporate governance	Secret	Open (constitutional guarantees, no FOI)	Open (with FOI)
Transparency of accountability process	Closed	Open	More open
Knowledge of accountability expectations	Less	More	Diverse
Capacity to account	Limited	Dynamic	More dynamic
Effects of the accounts	Less significant	Significant	Highly significant
Audience of the accounts	Government	More government, less citizens	Government and citizens

In a corporate governance structure where secrecy reigns accountability management is constrained. Not only is the knowledge about the expectations of accountability less known among public servants and citizens, but the process through which accounting is to be made is closed and obscure. In this setup, the capacity to account by government is limited to what it feels it has to account to citizens for, and the effects of the accounts are less significant. This is so because internal accounting

³³⁷ Personal interview with UK/9, 07/04/04.

takes precedence over external accounting. Citizens may anticipate that government will account to them but will not have any legislative right which they can use to compel government to account to them in a transparent manner. Invariably, secret governance structures are not so much concerned with the disclosure of information to citizens but with its availability to support internal accounting. Hence, even if good records management was in operation, it will serve the needs of internal accounting. However, in corporate governance which is closed and secret, government will not see any benefits in having good records management since transparency will be something that is not considered as important.

Where government is open, the expectation is that governance will be premised on disclosure and access to information. Governments which are open are expected to be transparent in their conduct of public affairs, and to create records which can support and act as evidence of what they are doing or they will have done. The transparency expectation of open government dictates that governments disclose public information and enable citizens to gain access to it. It is through being transparent that open governments are able to account to citizens. However, the strength of being transparent and being able to account is derived from the capacity to record what is being done by government and the level at which citizens can gain access to this information. Precisely, open governments can better account when they have in place good records management to record what is being done, to make these records available for accounts to be extracted from them, and to produce and make available for access the accounts. Hence, access to information and good records management should not be additional extras for corporate governance accounting but should be integral parts. In this environment, public servants possess better knowledge about both their internal and external accountability expectations. Even though government will try to be transparent as it accounts, accountability management where access to information is premised on constitutional guarantees will be asymmetric. That is, governments will decide on the type of accounts which are sufficient in informing citizens whilst citizens will rarely have direct access to other accounts which have not been released for public inspection.

Literature and respondents suggest that corporate accountability premised on good records management and FOI legislation has the propensity to reduce transacting public business to oral transmission rather than being captured as records. Willis writing in relation to Australia stated:

Some officials of the public sector bodies seem to have an absolute fear that their own notes or records will be released under freedom of information application and, therefore, be available for public scrutiny-and perhaps criticism...I have seen compliance officers in a department who took notes to support their reports, dispose of their notes once the reports were written. They were hit by the freedom of information fear factor.³³⁸

The report of the Gomery Commission in Canada expressed similar sentiments. It said: "Public service managers may be reluctant to accept greater transparency because they fear the consequences of their errors of judgement being publicly exposed."³³⁹ A UK respondent also added that "at the extreme there are records that an organisation may no longer create because they might be damaging to the organisation when discoverable under FOI..."³⁴⁰

Despite these opinions, both literature and respondents argue that if organisations or public servants resort to oral transmissions, accountability management will be affected. Dismissing orality as an alternative to the disclosure of records, the Gomery Commission contended that records which capture "errors...should be exposed to public scrutiny and comment, and the public servants responsible for errors committed in good faith should not be penalized because they made a decision that did not achieve the anticipated results...public servants should not fear embarrassment in the event that their advice to their superiors may be disclosed..."³⁴¹ The same UK respondent in the preceding paragraph further observed that "most organisations, looking at what went on in Canada, United States and Australia, found that there are no benefits to this and will probably not take that approach but inevitably people will be thinking of the consequences of FOI and will

³³⁸ A Willis 'Corporate governance and management of information and record:' 92.

³³⁹ Canada Government, J H Gomery *Commission of inquiry*: 178-179.

³⁴⁰ Personal interview with UK/12, 18/05/04.

³⁴¹ Canada Government, J H Gomery *Commission of inquiry*: 179.

take appropriate steps to make sure they do not expose themselves any more than is necessary.”³⁴²

If the adoption of FOI legislation is taken to be “the time has come to shred and destroy records”³⁴³ or leads to a complete failure to create and maintain records, government would be unable to account. This, as a respondent from the UK highlighted, “potentially is worrying not only from denying the public access to records but also leads to unreliable decision making.”³⁴⁴ Where governments which are open decide not to create records or opt for other related activities, they will slowly slide into secrecy. The ability of FOI legislation and good records management to improve corporate accountability should not be construed as obstructing public service delivery but should be taken to be a deterrent to secrecy which could breed corruption.

6.2.4 Summary of the corporate governance based relationship

The three corporate governance relationships discussed in the preceding sections are interrelated and interdependent when looked at in the context of the hypotheses in section 5.5. Any changes to the corporate culture, enhancement of risk and accountability management will lead to more responsive government, the emergence of clearer information networks, and enhanced understanding of government-citizen relationships. However, these developments will only be noticeable where good records management is operational and FOI legislation has been adopted to enable citizens to inform themselves rather than just wait for government to facilitate this.

Any changes in the corporate culture which are expected to enhance openness of governance depend substantially on good records management and FOI legislation. Although it is possible to instil changes to corporate culture, for instance, through the release of more information into the public domain, risk and accountability management will remain static where FOI legislation has not being adopted. The

³⁴² Personal interview with UK/9, 07/04/04.

³⁴³ Personal interview with UK/16, 09/12/04.

³⁴⁴ Personal interview with UK/11, 30/04/04.

adoption of FOI legislation and existence of good records management are catalysts to effective culture changes in corporate governance. By virtue of these two processes, government will be able to release information as well as ensuring that citizens can gain direct access to it.

This two-way activity which enables government to release information to citizens as well as allowing them to gain direct access to it facilitates better risk and accountability management. Risk and accountability management are enhanced when defined access to information networks has been established. Where citizens are not able to access information through the government's initiative they have at their disposal other avenues which they could utilise in gaining access to official information.

As risk and accountability management including effective changes to corporate culture become enhanced through the relationship which records management shares with FOI legislation, governments become more responsive. As government releases information into the public domain and citizens can also gain direct access to records, it is proof that government vies to be transparent. Hence, through creating a viable access to information environment, government is also building within citizens a culture of knowledge of how government works. It is through the attainment of this knowledge that citizens are able to interrogate the functionality of government programmes and its responsiveness to their needs.

6.3 *Reciprocal relationships*

Reciprocity is used across disciplines to establish how elements in a relationship work together in meeting similar objectives. This type of relationship is principled on the understanding that the elements of the relationship have complementary roles which tend to benefit one another. For instance in a reciprocal relationship, records management tends to have a complementary role to FOI, and FOI has a similar role for records management. In order to put into proper perspective the reciprocal relationships of records management and FOI, this section will address them from two viewpoints. Firstly, records management and FOI share

complementary roles and secondly, they also enjoy a mutual relationship through which they work together.

6.3.1 Complementary reciprocal relationships

Whether or not FOI has been adopted, records management is critical for supporting business processes. For instance, a UK respondent suggested that records management is an “organisational approach to everything the organisation does...the role of records management is to capture all the information an organisation needs and keeps it for appropriate periods of time.”³⁴⁵ An Irish respondent observed that the “records management agenda...is larger than FOI. It is a fundamental business need...I suppose that in jurisdictions where you do not have freedom of information hopefully you will still have records management.”³⁴⁶ However, the UK respondent added that “it (records management) is important but I think at times it is misinterpreted in that when people look at FOI they decide that they need to do something about records management and records management is decided and developed within the parameters of specifically FOI requirements. I believe that records management should be developed for the needs of the organisation.”³⁴⁷ The above seem to acknowledge that records management facilitates access to information in an FOI environment. Records management may be a ‘larger agenda’ but FOI facilitates access to the information which government would have created and hold by virtue of records management.

Records management and FOI have complementary reciprocal relationships. Although each can stand alone, when they co-operate or work together, they can achieve similar objectives. The central objective of FOI is to enable ease of access to information, and that of records management is to create, receive, hold, manage and make available information when it is needed. Thus, records management plays a complementary role for FOI by ensuring that information is available for access. FOI also complements the role played by records management through implying that the information to which it guarantees access already exists. This complementary

³⁴⁵ Personal interview with UK/9, 07/04/04.

³⁴⁶ Personal interview with IRE/2, 14/12/04.

³⁴⁷ Personal interview with UK/9, 07/04/04.

relationship triggers responsibility within government to ensure that records and the information they capture may be made available for access under FOI legislation. In this respect, the expectation which evolves for access to records through FOI legislation anticipates the creation and management of records.

This relationship between records management and FOI legislation is two-way, since both are aimed at facilitating access to information. FOI is principled on the implication that access can only be effected if the information is known to exist and can be retrieved for access. Records management is principled on having oversight over the creation, capture and management of information hence implying its availability when needed. Once FOI legislation has been adopted, the presumption is that government will create and hold records which citizens can access. The other presumption is that government will ensure that it creates and holds records, and that they will be accessible under FOI law. The implication that information exists, triggers a responsibility within government to ensure that the information indeed exists, and that it will be accessible when requested for direct access by citizens.

The scale of the complementary reciprocal relationship is likely to be variable depending on a number of factors. At times, the relationship will be seen as beneficial to both government and to citizens. At other times, it may appear that citizens benefit more, which may not rest well with government. The relationship can also have a negative impact for both government and citizens especially where public servants see it as intruding into their duties rather than facilitating accountability, trust, and transparency.

The creation of a more equitable access to information framework may mean that both government and citizens enjoy the benefits of the complementary reciprocal relationships. The relationships could enable citizens to gain access to government through the records which it creates and uses. By virtue of access to records, citizens become better empowered to engage government constructively in consultations. Government too, because of the possible requests to gain direct access to records by citizens, will attempt to capture succinctly its deliberations in records. It will also make prudent use of the records in generating more responsive programmes and in carrying out public affairs. Seen from this viewpoint, both good records management

and FOI legislation complement one another in enabling citizens to gain direct access to the information which government will have created and holds. At the same time this relationship will allow government to benefit from the knowledge which citizens may develop after having had access.

The main problem with the complementary reciprocal relationship is that government may, if citizens become aggressive in questioning its efficacy and performance after gaining direct access to official records, resort to curtail future potential access. Government may not revoke the legislation or remove records management but it may privatise the areas which attract the attention of citizens in a bid to remove them from the coverage of the legislation. This will succeed if the legislation does not extend coverage to the private sector (like that of South Africa). Even so, respective businesses may stretch the commercial confidentiality exemption clauses to cover this information. At other times, government may contract out those services or insert clauses empowering a respective minister to veto access to contentious information or it may opt to hike access to information fees. If any of these were to occur, the complementary reciprocal relationships would be more beneficial to government than to citizens. Although this relationship can generally create more openness of the governance process, when exposed to government intervention, secrecy of the state and asymmetries of information will continue to exist.

Another problem arises if public servants perceive improvements in records management as facilitating citizens' access to the information they create and use. This is especially true when public servants perceive FOI legislation as benefiting citizens and exposing government officials to undue scrutiny. In this scenario, public servants see the complementary reciprocal relationships as intruding into their duties. Viewed from this perspective public servants could, as mentioned earlier, revert to oral 'recording' of public information. They could also devise internal strategies that would delay the identification and retrieval of the records which are requested for access under FOI legislation or they could respond that the information needed is not held anymore without making any attempt of finding it. Snell, making reference to the 1987 Nash Report on records management and FOI in the Victorian Department of

Premier and Cabinet, Australia, argued that once seen as an intrusion FOI could lead to.³⁴⁸

- Information not being captured as records;
- Information or records not being indexed to make their identification and retrieval for purposes of meeting FOI demands difficult;
- Public servants disregarding good records management to the extent of removing correspondence and other information from official registered files to create their own personal files;
- Public servants failing to keep track of the movements of files leading to some going missing;
- Low morale of records management personnel due to the indifference directed to good records management practices.

The above shows that any obstruction on the functionality of the complementary reciprocal relationship between records management and FOI legislation would have repercussions. Any sabotage that can be made on records management will trickle down to FOI. Also any sabotage on access to information through FOI legislation can affect records management in the sense that records may not be created or may not be well managed to frustrate access attempts. However, any attempts which are meant to frustrate the efforts of citizens in gaining access to information has the potential to backfire on government. When records are not created because they are likely to be accessed by citizens, this will lead to the unavailability of information to support the execution of public functions and subsequent decision making.

However, where the relationship is seen as a tool leading to improved productivity and accountability, public servants may resort to enhancing the capacity of records management to capture and hold concise informational contents; ensuring that the contexts within which the records have been created are clear, as well as seeing to defined record structures. Further, public servants could ensure that

³⁴⁸ R Snell 'The effect of freedom.'

government proactively releases many more records into the public domain thus informing citizens more about the governance process.

6.3.2 Mutual reciprocal relationships

Records management and FOI legislation also share mutual reciprocal relationships. In a mutual relationship all the elements which compose it, support and work together in reaching similar ends. In terms of the records management-FOI relationship, each of these two processes supports each other and is accommodative of the efforts made by the other in reaching some established goal.

Underlying records management is the responsibility of ensuring that records are available and are also accessible to support the execution of public affairs. Although records management is mostly designed for the internal use and benefit of an organisation, through FOI legislation citizens benefit from it as well. Hence, the adoption of FOI legislation brings about mutual benefit derived from records management. Mutually, the goal of records management is to facilitate access to information internally within an organisation, and FOI legislation broadens the access to cater for citizens. The mutual goal of the two processes therefore is access to information: records management has internal access as its goal while FOI legislation targets citizens.

Although records management is meant to support business processes it also mutually supports FOI legislation. This it does by providing an assurance that records are created and managed in the normal course of business, and that they can be made available for access following requests made by citizens. At another level, records management enables organisations to peruse their records and to establish the ones they could release into their FOI manuals or to garner information from them for proactive disclosures. FOI legislation, as is shown by the evidence presented in 2006 before the Constitutional Affairs Committee of the House of Commons reviewing the

UK legislation after one year of operation, is mutually beneficial to records management in government.³⁴⁹

The mutual reciprocal relationship is two-way in that records management ensures that information is available to be accessed while FOI legislation creates a viable access framework. For instance, the knowledge that records can be accessed through FOI will create within an organisation, a network which will enable staff receiving the requests for access to work with those overseeing records management so as to speed the identification and retrieval of records. This also enables both sets of staff to comprehensively evaluate the records against applicable exemptions before they can decide on their release. Records management will also have policies that may lead to information not being available for access, for instance, retention schedules. If this were to occur, the mutual relationship enables staff responding to requests to be able to explain to requestors the reasons records are unavailable for access.

This mutual relationship also creates intradepartmental networks. Because of the constant restructurings within the public service, it is possible for public functions to be moved across departments or for some functions to be split and be shared by more than one department. Where this happens and requests are made for access, it may be found that the request has to be transferred or has to be shared with a different department. Instead of dismissing the request on the grounds that the information is not held, the mutual relationship allows departments to determine if the records whose access is requested have been transferred along with the function. If this is the case, the request will be transferred to the respective department. Where the records have been split between more than one department the request may be copied to all those concerned. When this occurs, the department which received the request initially will inform the requestor about this development.

³⁴⁹ The author has attended all the hearings of three sessions to review the UK legislation on the 14th and 28th March, and on the 18th April 2006. The report has been published as: United Kingdom Government, House of Commons Constitutional Affairs Committee *Freedom of information-a year on: seventh report of sessions 2005-06* (London: The Stationery Office Limited, 2006). Available at <<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/991.pdf>>. Accessed 29/06/06.

The success of the mutual reciprocal relationships can be judged from whether they have generated more openness and whether asymmetries of information have been reduced. If a governance system is closed and information asymmetries exist, FOI legislation can reverse this. However, as mentioned in section 6.2, it takes much more than the adoption of the legislation to reverse the asymmetries and to generate more openness of government. The legislation can be adopted but it may be held ransom by the behaviour of government and public servants. The mutual relationship between records management and FOI legislation has the capacity to heighten the secrecy of government and increase further the asymmetries.

A case in point is Zimbabwe. The adoption of FOI legislation in Zimbabwe in 2002 has not brought about the anticipated benefits. Ever since the adoption of the law, governance in Zimbabwe has failed to open up and information asymmetries have risen. Roberts has observed that the law in Zimbabwe provides:

a right to government documents, albeit a right that is hedged by broadly drawn exemptions. The law also created a Media and Information Commission to hear complaints about denial of information. However, a 2004 report found only one instance in which the right to information had been exercised. This was hardly surprising, because the 2002 law also included severe restrictions on press freedom, including fines or imprisonment for media outlets and journalists who have not registered with the Commission...The principal use of the law was to harass journalists...³⁵⁰

The mutual relationship between records management and FOI legislation has created an environment adverse for viable access to official information. The FOI law in Zimbabwe and capacities of records management have only helped widen the asymmetries and to further entrench state secrecy.

6.3.3 Summary of the reciprocal relationships

Even though FOI legislation is capable of existing irrespective of the state of records management, it will nonetheless rely on the information which records capture. The fact that records management and FOI legislation can work together to create viable access frameworks suggests the two processes are reciprocally related.

³⁵⁰ A Roberts *Blacked out*: 120-121.

Good records management is a guarantee for access. However, the example of Zimbabwe has shown that the reciprocal relationships, if unchecked, can produce negative results. Within the mutual relationship, both records management and FOI legislation have as their underlying objectives the desire to make information available for access. The purpose of records management in creating and managing records mutually supports the objective of FOI legislation to enable citizens to gain direct access to official information.

6.4 Causal relationships

Snell has argued that FOI legislation is not the only factor which may impact on records management. He went on to say that when making attempts at delineating the impact made by FOI legislation on records management, other factors, for instance, technological advances have to be considered as well.³⁵¹ Similarly, records management can also impact on FOI legislation, and it will not be the only factor capable of doing so. The bottom line is: records management and FOI legislation share a relationship within which one can impact the other. Specifically, records management and FOI legislation share a cause-effect or causal relationship. In this relationship, changes in either records management or FOI effects changes on the other. Exploring this relationship between records management and FOI legislation will be undertaken from two fronts. Firstly, the relationship will be explored from the perspective where records management triggers the cause that lead to changes in FOI. Secondly, the exploration will put FOI legislation at the fore and seek to establish its effects on records management.

6.4.1 Causes in records management effecting changes in FOI

When FOI legislation is adopted, departments are charged with the responsibility of knowing which information they hold, where it is located and how it can be made available for access.³⁵² It would erroneous to suggest that when FOI legislation implies that organisations have to know the information they hold, it imposes a new responsibility on organisations. Naturally, organisations by virtue of

³⁵¹ R Snell 'The effect of freedom.'

³⁵² See section 1.2.6.

creating records for informational and evidentiary purposes are expected to know the information they create, use and hold. In line with this, one UK respondent observed that:

On the one hand you have your organisational framework which recognises records management as something which is done and people are expected to do it and it is not regarded as a cost overhead. It is done as part of the normal daily business. You keep records of what you do. On the other hand, on a more practical level, you have to know what you have, what is there, which means that records that are kept have to be controlled and managed in a way that the country's knowledge of what it has will be known.³⁵³

FOI legislation cements the obligation already expected of an organisation in generating and keeping information. Implied in this argument is that organisations are obliged to generate and keep records to inform what they do, and they can use that information to inform other bodies including the public.

By ensuring that records are created for informational and evidentiary needs, records management assures that these same records can also be accessed for purposes of FOI. Any changes in records management that are geared towards facilitating better and more informed transactions, are likely, where sabotages do not exist, to generate improvements in the ways organisations comply to FOI legislation. A UK respondent stated that:

I believe that FOI will lead to much better records being created. I can give you an example: if you are dealing with a contract and you've got some competing tenders, competing firms competing for the project. If you know what contract documentation will be released I think you've got to be absolutely rigorously honest in the basis of your decision. You've got to take the decision honestly. You've got to records your decision very, very clearly because you know that the people who do not get the contract can put in an FOI application to see the documents.³⁵⁴

Once records have been created, records management initiates their classification into classes and series and groups them to reflect their relations. Although this is done for the purposes of enabling easy identification and retrieval of records internally within

³⁵³ Personal interview with UK/4, 30/01/04.

³⁵⁴ Personal interview with UK/13, 19/05/04.

the organisation, it can facilitate effective implementation of FOI legislation. According to another UK respondent:

from the applicant's point of view there is a very good reason why records have to be properly managed. From the organisation's point of view there is a very good reason why records have to be properly managed because it is going to speed up their response to FOI request and it is going to cut the costs of responding to FOI requests. Because they will be able to find the information, process the requests, make decisions whether to disclose it or not but all be able to do so fairly speedily and efficiently.³⁵⁵

Good management of records is thus a cause leading to effective FOI practices. Through good records management applicants are able to identify with ease the records that may inform their requirements. Since records management would have classified the records, organisations will also be better placed to speedily identify and make records available whenever they are needed.

The above shows that records management has causal factors which can create a better FOI regime. Although respondents spoke of records management generating positive changes in FOI, there is also some likelihood that the causal factors may generate outcomes which are negative. For instance, if good records management is taken to contribute to efficient FOI legislation, some public servants may not take this development in good light. As a result, they may adopt the tactics discussed in sections 6.2 and 6.3. Were this to happen, it will not be FOI alone which may end up being affected but the entire business processes. If records management was to be viewed in this way, it would further indicate that public servants do not desire to be transparent and accountable but would rather prefer a public which is passive and ill-informed.

Weak records management also has causal factors effecting changes in FOI legislation. Weaknesses in records management are seen through the lack of policies, guidelines and other pertinent measures which will enable public servants to generate and use records. Were this to happen, records can be created but may not be well classified making their retrieval difficult, and may be destroyed without regard for

³⁵⁵ Personal interview with UK/4, 30/01/04.

their importance to the business process or the history of the community. When faced with this, governments may suffer from the lack of adequate information in carrying out public functions. Added also, attempts to be accountable can prove arduous because information may be incomplete, unavailable or could be difficult to access. Records management which is weak affects not only the business processes but will also impede FOI legislation.

6.4.2 Causes in FOI effecting changes in records management

Most respondents believed that FOI legislation draws records management from the backroom of organisations and moves it into the boardroom. FOI legislation, they observed, has the potential to enhance the value and the importance of records management in organisations. A UK respondent put it thus:

Where records management does not exist, it will come into existence because of FOI necessity. For organisations to comply with FOI they have to manage their records. I think if you like, there has to be a symbiotic relationship between the two. Both have slightly different purposes but both have outcomes which are beneficial. Certainly in this organisation we have a records management team, we have an FOI team and they work very closely together on a number of issues. In many cases it may be records managers who are FOI practitioners as well.³⁵⁶

Another opined “five years ago records managers were considered to be filing clerks but now they are serious people... There is recognition to restore records management values and FOI is clearly an essential part of that.”³⁵⁷ The adoption of FOI legislation leads to a culture change where records management is not just seen as an additional business need but an essential process. Records managers, who before the adoption of FOI laws had made attempts to improve the management of records, were often not taken seriously. One reason behind this may be that employees were just happy when records could be found and be made available to them. How they were managed was really never an issue. The importance of records management was for that reason tied only to the need for information (being able to make it available) and less to its creation, classification and disposition. The adoption of FOI legislation has reversed

³⁵⁶ Personal interview with UK/9, 07/04/04.

³⁵⁷ Personal interview with UK/13, 19/05/04.

this. Records management is now seen as core to business processes and as important towards facilitating access to information. The new realisation that information may be accessed directly by citizens has led to records managers being taken seriously.

6.5 *Implications of the records management-FOI relationships*

In light of the relationships between records management and FOI legislation a thesis posited by Roberts is applicable. Roberts posited that the adoption of FOI legislation around the world has followed three waves. The first wave took place prior to the 1990s and was composed mainly of the rich, developed and democratic states that adhered to the rule of law and respect for fundamental human rights. A combination of democracy, respect for human rights and adherence to the rule of law provided a guarantee that the laws would be made practical.³⁵⁸ Basically, these factors are in line with the ingredients developed in Chapter 5 for creating a viable and effective FOI regime.

The next wave which adopted FOI legislation after 1990 was composed of mature democracies (who had missed the first wave) and Eastern European countries that were once under the Soviet regime. These mature democracies possessed the qualities of those in the first wave. The Eastern European countries mostly adopted the legislation to usher in transparency, democracy and accountability having had been subjected to secrecy under the communism regime of the Soviet Union.³⁵⁹ South Africa, the first African country to adopt FOI legislation, fits into this category. By adopting FOI legislation, South Africa was replacing secrecy which was characteristic of apartheid with democratic governance which was open and accountable.

The last wave emerged after 2000 and has included Mexico, Pakistan and Zimbabwe. It appears that adoption of FOI legislation in Pakistan was a part of the conditions for receiving aid from the World Bank. Roberts argued that FOI legislation in Pakistan “had been adopted purely for the sake of appearances. Pakistan may have

³⁵⁸ A Roberts *Blacked out*: 107.

³⁵⁹ A Roberts *Blacked out*: 108-109.

illustrated the potential for backsliding. Routinely ranked by TI as one of the most corrupt countries in the world, Pakistan eventually agreed to adopt a Freedom of Information Ordinance in September 2002...³⁶⁰ Zimbabwe's FOI legislation which is ineffective appears to have been imposed on the country. However, when countries seek developmental aid they would do all in their power to obtain it. Even if it means enacting a pseudo-access to information law, countries which are desperate for aid will pass FOI laws just to satisfy the conditions that they are expected to satisfy. The problem resulting from this is that, countries which pass FOI laws so as to satisfy conditions for loans or grants are likely to be less committed to their functionality.³⁶¹

Considering the relationships discussed in this chapter, three issues emerge in the light of the above waves for adopting FOI legislation. When the first wave of countries adopted FOI legislation, it appears they did very little to ascertain the effectiveness of records management. For them, records management was practical and was able to support the business of their governments. This may have resulted from the fact that the adopters were rich countries, democratic and who observed the rule of law, and upheld fundamental human rights. It appears, as evidenced by the observations made especially by the Canadian Information Commissioner, that with time, the realities of access to information negatively affected records management.³⁶² Precisely, the growth of access to information resulted in flawed adherence to records management procedures. This might be another reason explaining the conclusions arrived at by Gilbert when he stated that the management of records in the Canadian public service was defeating the purpose of FOI.³⁶³

The trend appears mixed in the second wave adopters. While the UK understood the importance of good records management for FOI legislation other adopters were content in passing the laws to correct failures of previous governance systems. When the UK passed its FOI law in 2000, the law through section 46 acknowledged the importance of good records management for enabling effective

³⁶⁰ A Roberts *Blacked out*: 111.

³⁶¹ A L Dick 'Power is information: South Africa's Promotion of Access to Information Act in context' in F Crestani and I Ruthven (eds.) (Berlin: Springer-Verlag Berlin Heidelberg, 2005): 212-225. Available at <<http://www.springerlink.com/content/w75phwu5gv26ld4w/fulltext.pdf>>. Accessed 20/04/06.

³⁶² See sections 2.3.1 and 5.4.4.

³⁶³ See section 2.4.1.

access to information.³⁶⁴ The other adopters of this time, from East Europe and South Africa did not pay particular regard for the importance of records management in the access process. What was critical at that time was for the laws to be passed to enhance the democratic process that was being built. Good records management appears to have been an additional optional extra to the process and as such was not given the consideration similar to the one the UK had given.

The third wave generation of adopters were coaxed into legislating FOI so as to secure developmental aid or loans. Hence, it is not surprising that the laws in Pakistan or Zimbabwe have not delivered the anticipated returns. When the need to enact the FOI laws was weaved into the conditions for obtaining developmental aid, the importance of records management in the provision of access to information was overlooked. The laws in Pakistan and Zimbabwe may be failing also as a result of weak records management systems which are unable to avail information for access.

Now that other countries, for instance Botswana and Malawi,³⁶⁵ are planning for the adoption of FOI legislation, a fourth wave is setting in. However, most of these will be developing countries with some from Africa. These will also be different in terms of their developmental and democratic status. For instance, some of these countries will be poor and others will be middle income. However, the studies which the IRMT has undertaken in some of the developing countries have revealed that some of them are facing decaying records management systems.³⁶⁶ Roberts has also observed that the adoption of FOI laws by this fourth wave will test their administrative capabilities. He added that one “mundane but nonetheless critical issue is the ability of government to document their work and organize their records so that they can be retrieved later. The right to information is meaningless if files do not exist or cannot be found.”³⁶⁷ Records management in the newer adopters of FOI laws should be taken to be an integral part of the access regime rather than an afterthought or an optional extra.

³⁶⁴ United Kingdom Government, *Freedom of Information Act* (London: Her Majesty's Stationery Office, 2000). Available at <<http://www.opsi.gov/acts/acts2000/20000036.htm>>. Accessed 21/08/06.

³⁶⁵ See sections 1.3.2, 3.3 and Chapters 7-8.

³⁶⁶ See section 2.2.1.

³⁶⁷ A Roberts *Blacked out*: 111.

It is essential that when the developing countries join the fourth wave of adopters, their records management systems should be functioning. They have to note that the adoption of the laws as the discussion on the relationships has shown, will test the capability of records management. These countries should understand that the relationships between records management and FOI legislation are dynamic, complex and multifaceted. The relationships can either be positive or negative or a combination of both. From the complex nature of the relationship arise challenges for government (politicians and public servants), citizens, overseers and campaigners for FOI, and for the academia and research. From these challenges are engrained certain implications which need to be addressed.

6.5.1 Implications for government

These relationships pose three implications for government. The first is the acceptance that FOI legislation is premised on the perceived existence of information which presupposes the existence of good records management. Next, records management and FOI legislation may be independent processes but FOI is more of an information policy which necessitates the development of good records management. The third is the knowledge that the success of FOI legislation not only relies on good records management but also on the commitment of public servants towards its objectives.

- **Acceptance that FOI is premised on good records management**

The relationships between records management and FOI legislation suggest that it would be risky to implement FOI without having made evaluations to determine the efficacy of records management in documenting and supporting the execution of business. Records management is designed around business functions hence it is crucial to ascertain its responsiveness in furthering the goals of the public sector. Governments should be wary of the fact that when citizens request for access to information they are making an attempt to gain insight into the varied functions of government. In view of this, citizens will be able to gain this insight through access to records. It is therefore pertinent that governments should ensure that public sector records management systems have the propensities which would capture all

governance processes. Governments, as a result of these relationships, are obliged to accept that FOI legislation will not adequately facilitate comprehensive access to information when records management is weak.

Records are the most trusted information resource of government and are the main contenders for direct access by citizens. Where records are lacking in-depth information and evidence of public activities, citizens are bound to accuse government of complacency and covering-up. However, when good records management is institutionalised, the records that are created are more likely to inform citizens better. Hence, through access to records, citizens are better placed to develop trust on the different institutions of governance. Through access to records, citizens are able to believe that government is transparent, is responsive to their needs and it has nothing to hide. When records are not released, citizens should be able to accept that this is done within the guidance of the law, and they could challenge the non-disclosure without necessarily seeking court intervention.

- **FOI is an information policy**

Government should also be aware that by adopting FOI legislation they are creating a framework within which citizens would want to gain access to the records which support the current activities of government. It is therefore crucial that governments should come up with modalities which would address this eventuality without having to affect daily administration. Governments should also ensure that public servants will not, with time, hide behind administrative processes so as to deny or frustrate attempts to gain direct access to official records.

- **Success of FOI is also based on the commitment of public servants**

FOI legislation needs much more than good records management for it to succeed. One of the pillars of any successful FOI legislation is the public servants. For the law to succeed, public servants have to undergo a culture change in which they will have to accept that FOI is not an intrusion but a measure meant to help them perform their duties better. It is a law which also sets a reminder on the importance of records management to the various business processes. Therefore, government should venture into allaying fears for FOI through training programmes, peer support

networks and heighten promotion of the importance of records management, and clearly highlight its values in facilitating compliance to this legislation and many other governance requirements. Further, government should encourage and enable public servants to build information networks through which they can learn from one another about FOI issues.

Snell has argued that the public service is at the centre of FOI implementation. The public service can as a result lead to the success or failures of the legislation. Public servants who are dedicated to the legislation will:

- Prevent and minimise failure to comply with the requirements of FOI;
- Promote and increase compliance to the legislation;
- Expose and contain spin doctoring;
- Enable a viable use of FOI by the media.³⁶⁸

In line with these observations, the Canadian Access to Information Review Task Force has recommended that the following will improve the commitment of public servants in furthering the aims of FOI legislation:

- Job descriptions of public servants should encompass responsibilities binding them to provide access to information according to the prescriptions of the FOI law. The job descriptions should also mandate them to share in the responsibilities of managing public sector records management. It is through this engagement that public servants are more likely to promote access to information and uphold observance to good records management principles;
- The performance agreements for managers in public organisations should mandate them to create and oversee the performance of access to information systems in their institutions. The agreements should also present a reminder that good records management underlies efficient provision of access to information;
- Regular meetings to review the performance of individual government departments should also review their capacities to adequately manage records and to provide access to information;

³⁶⁸ R Snell 'FoI officers- a constituency in decline?' *Freedom of Information Review* 102 (2002): 69-72.

- When governments introduces new public programmes, records management and access to information should be inbuilt into them;
- Good records management and access to information should be part of the corporate governance plans of government departments. Since, access to information is dependent on good records management as this chapter has shown, the effects of these processes on one another should be part of the objectives the institutions should seek to achieve.³⁶⁹

6.5.2 Implications for citizens

Citizens are the core of government. They are partners in the governance process and everything that government does is for their benefit. Hence, there is a need for them to offer informed consent and become active participants in the way they are governed. There is thus a necessity to remove the asymmetries and state secrecy so that citizens know their rights and obligations as they offer consent or participate in governance. Government stands to benefit from the knowledge which citizens possess and this will develop more once they have had direct access to the records of government. Relationships of records management with FOI have two main implications for citizens. Citizens in light of the strengths and weaknesses of relationships above should use the legislation to inform themselves, and to be vigilant and to have independent oversight on its practicability.

There are times when public servants can both support and facilitate execution of the FOI legislation, at other times they will sabotage it. Hence, citizens are faced with the challenge of being abreast with the legislation i.e. how it works, as well as being able to detect when it is being sabotaged. To meet and live up to this challenge, citizens should venture into making requests across the broad spectrum of governance and where access to records is delayed or not forthcoming, they should appeal. The appeals could lead to evaluations of the delays in relation to records management among other things.

³⁶⁹ Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians*:161.

6.5.3 Implications for the Information Commissioners, Ombudsmen and campaigners

Government cannot be a referee as well as a player of its own game. In adopting FOI legislation, governments are trading secrecy for openness and the asymmetries for near symmetrical access to information. However, the change of culture towards more openness might not be easy, and there will be constant temptations to revert to secrecy. As a result, it is important that other stakeholders exist to help level the FOI playing field. Countries like the UK, Ireland and Canada have independent Information Commissioners who are charged with oversight of the legislation. Within the government bureaucracy departments dedicated to oversee public service compliance to the law will exist. Their efforts should be balanced with independent oversight which the Information Commissioners are entrusted with.

The relationships between records management and FOI legislation posits a thesis that Information Commissioners and other Non-Governmental Organisations (NGOs) which have independent oversight over FOI legislation should develop capacities for evaluating records management. The Information Commissioner in Canada has over time called for the recognition of the role good records management plays in the access process. Information Commissioners will have to evaluate the efficacy of records management in facilitating access to information from time to time. They will also have to develop working agreements with other institutions whose ambit is developing public sector records management systems. However, the success of the evaluations into records management or the relationship with these other institutions will be viable only when the Information Commissioners themselves are abreast with functionalities of records management.

Once armed with records management capacities, the Information Commissioners will be able to provide to parliament through annual reports, the state records management is in. Where records management is weak and is in needs of further improvements, the Information Commissioner would highlight this in the reports. Through the reporting, the Information Commissioners could market to parliament the importance of records management to the process of access to information and to good and honest governance. Through the intervention of

parliament, records management could undergo better recognition and become a part of critical governance agenda.

Information Commissioners who have capacities for records management can educate citizens about how information is created and how it is held in government departments. By so doing, Information Commissioners will make citizens appreciate the values of good records management not just for internal government duties but for purposes of external accountability and their democratic participation.

6.6 Conclusion

The relationships between records management and FOI legislation are both interesting and negative at the same time. The relationships are interesting in the sense that the adoption of FOI legislation suggests that citizens may end up being able to gauge the capacities of public sector records management. They are also interesting in that the importance of records management seems to be brought about by FOI legislation. Records managers have been speaking about the importance of good records management prior to the adoption of the legislation. With the adoption of the law, the reality that citizens may gain direct access to records sinks in and the same message about the importance of good records management which records managers have been trying to put across is suddenly listened to. Lastly, the relationships are interesting in that the adherence to them can lead to more transparent, accountable and honest governments.

They are negative in that although the objective is to increase openness and responsiveness of the public sector, spin doctoring always exist to thwart the objectives intended. Even though some public servants will be committed to transparency, others will attempt to retain secrecy of the governance process. Governments are also known to pass FOI laws without making provisions for additional resources which would facilitate comprehensive access to information.

The joint effort by good records management and FOI legislation has the capacities to reverse information asymmetries and state secrecy. In this respect, citizens not only rely on government to release information but they too can gain

direct access to official information. Through access to information, citizens are able to gain precise knowledge about the functionalities of the government process and the effects of records management in them. Through the help of the relationships, citizens are likely to request access to file plans, file indexes and retention schedules where delays exist in processing their requests for access to information.

Records managers across many countries call for governments to make improvements to public sector records management. Many times the attempts of the records managers have been futile since they were not heeded and at times the process was lowly resourced. However, once FOI is enacted, records managers are more likely to be listened to and records management is more likely to be recognised as an important process of governance. The danger that can arise from this is that, the improvements that will be made on records management can be premised only on FOI and disregarding other equally important processes of governance. Hence, as this chapter has made clear, the efficacy of records management has to be considered when FOI is being planned. Through this, records management is looked holistically as a part of the process of governance, and FOI is also seen as providing a window into the activities of government.

However, where both good records management and FOI exist, governments will have better potential to open up more, be more transparent, and more honest as they relate with citizens. In view of this, the adoption of FOI legislation has to be home grown than imposed. Home grown laws are based on their need derived from having evaluated the local environment. As the Zimbabwe and Pakistan example has shown, commitment to imposed laws is likely to filter away with time. Those that are home grown are more committed since attempts will have been made to create the necessary conditions for their application.

This chapter has shown that governments are known to privatise or move some of their functions away from the ambit of the law. At times, some public servants develop techniques which they use to make access to information cumbersome. The fear that citizens will gain access to the records which public servants will have created leads to the development of the spin doctors. At other times, public servants revert to orality to generate 'of-the-record' transactions of government. Government

also have passed FOI laws without making additional funds to agencies to deal with the new requirements. The result of all these has been an access system which is not optimally effective.

The relationship between good records management and FOI legislation requires that the above issues be addressed even before they develop. Government, citizens, academia, research institutes and Information Commissioners should all work together to ensure that an effective access framework is created. This chapter has generated further knowledge of the relationships between records management and FOI legislation. These relationships need to be promoted as governments vie to adopt FOI laws. Despite the two processes coming together for purposes of access to information, records management is key to the governance process even where the law has not been adopted. FOI legislation is also important whatever the state of records management. However, good records management will assure that records and information will be available for access.

Chapter 7: Records management and FOI: situational analysis of access to information in Botswana

7.1 Introduction

Access to information in Botswana in 2006 is limited by the country's information distribution mechanisms, its archival capacity and its records management system. As a result, there is uncertainty over which government-held information citizens can gain access to, including the settings within which the access will take place. As it stands, the government of Botswana has adopted an over-cautious strategy which favours secrecy over access. However as section 1.3.2 has argued, some developments have been made which suggest that the adoption of some form of FOI legislation for Botswana is imminent. It is with this background in mind that this chapter evaluates the country's preparedness for the legislation. The preparedness is evaluated by establishing the need as well as the readiness for FOI legislation in Botswana.

The need for FOI legislation is analysed from five thematic concerns. Firstly, the chapter argues that Botswana's constitutional guarantee on access to information has not created a viable access framework which would benefit government and citizens equally. Secondly, the focus of the National Archives Act of 1978 in creating access arrangements for archival records denies citizens direct access to other records which are not archival. Thirdly, the failure of the Public Service Charter in promoting more transparent transactions of public affairs also denies citizens direct access to information. Fourthly, the role and expectation of the parliamentary process in Botswana to subject the executive to checks and balances amongst other functions, is limited by the controls which the government has imposed on access to information. Lastly, the state of records management in the public sector warrants further improvements which the adoption of FOI legislation may foster.

The ingredients for an effective FOI regime presented in Chapter 5 namely: democracy, accountability and records management will be used to determine Botswana's readiness for the adoption of the law. The final and possibly most critical ingredient, trust, is woven into the discussions throughout this chapter. In establishing the readiness of the country for the adoption of FOI legislation this chapter argues that Botswana possesses all the four ingredients, an indicator of the country's readiness and the existence of a potential to create a viable and flexible access regime. Lastly, Botswana's preparedness for the legislation is evaluated from the premise of *Vision 2016*, the country's national aspiration document.³⁷⁰

The chapter concludes by stressing that the primacy accorded to *Vision 2016* by the government of Botswana, and its call for the involvement of all stakeholders in carrying forward the ideals for 2016 depict the need as well as the readiness by the country for FOI legislation. By accepting the *Vision 2016* blueprint and recognising the tenacity of the council commissioned to drive the national ideals, bears testimony to the preparedness of the country for the legislation. The chapter also concludes by arguing that the ultimate adoption of FOI in Botswana will not be a result of the law being imposed or forming part of the conditions which the country will have to satisfy so as to obtain developmental aid. The adoption of the law will be home grown in line with the consultative processes which led to the formulation of *Vision 2016*. Furthermore, the inclusion of FOI in the *Vision* document was as a result of the desire of furthering Botswana's democratic tradition. Added also, Botswana's commitment to the success of law is likely to be high considering that the country upholds the rule of law, is democratic and respects fundamental human rights.

7.2 Need for FOI in Botswana

The need for FOI legislation in Botswana is firstly articulated by *Vision 2016*. *Vision 2016* has identified as crucial for Botswana to adopt FOI legislation so as to transform the democracy tradition of the country by making it more responsive to the needs of citizens; making the governance process more accountable; and opening government to practical external scrutiny.³⁷¹ The desire for the country to adopt FOI

³⁷⁰ See section 1.3.2.

³⁷¹ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 10.

legislation emanating from the Vision is cognisance of the fact that democracy is not static. As citizens develop and the world around them changes, democracy should also adjust to suit and support the new socio-economic and political yearnings of citizens. Molomo has observed that “democracy is not absolute but rather an ever-evolving process that needs to be nurtured and constantly refined.”³⁷² *Vision 2016* has also added that the “democratic process will be continually deepened and enriched in accordance with the general evolution of the society and wishes of Batswana.”³⁷³ The formulation and adoption of *Vision 2016* was meant to provide a tangible structure which was to guide the changes that would place Botswana at par with other best democratic traditions of the world.

Five other factors which will be evaluated to show the need for FOI in Botswana are: the failure of the constitutional guarantee in creating a more equitable access to information framework; the creation by the National Archives Act of a legal access arrangement for archival records only; the limitations of the Public Service Charter in creating a more transparent public service; the hindrance to effective scrutiny of parliament arising from the sole control government has over access to information; and the necessity to improve further public sector records management.

7.2.1 The need for FOI emerging from the failures of the constitutional guarantee in creating a more equitable access framework

The prospect for citizens to gain access to information in Botswana is underpinned by a constitutional guarantee on freedom of expression. This it does when it implies access to information through observing that citizens have “freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons).”³⁷⁴ Undoubtedly, the constitution does not plainly spell out that citizens can gain access to information. It is however implied that in order for Batswana to express themselves freely they would need to have been informed before hand. As section 4.2 has argued, Botswana’s

³⁷² M G Molomo ‘The role and responsibilities of members of parliament.’ 200.

³⁷³ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 22.

³⁷⁴ See section 4.2.1.

constitutional guarantee on freedom of expression presupposes that there is something which Batswana need to express. The fundamental characteristic of expression is the ability to gain access to information and to use it. It is the information which is subsequently expressed. Notably, citizens of Botswana can only communicate better when they have had access to information to formulate ideas which they can then communicate or express. Alternatively, citizens can gain access to the ideas of other persons and use those same ideas to formulate their own or inform the ones they already have.

The Special Rapporteur on Freedom of Opinion and Expression of the UNCHR noted in 1995 that access to information is not only converse to freedom of expression. Instead, the two were both fundamental human rights which demanded equal treatment.³⁷⁵ The expectation was that when countries protected freedom of expression they would do the same for access to information. However, as section 4.2.3 has shown, Botswana constitution was handed down to her by the UK at the time the country gained independence. Since the UK at the time of Botswana's independence was yet to adopt FOI legislation, she must have felt that one of the most important tasks which faced her former dependents desiring to gain independence was to protect freedom of expression. Maybe if by then, the UK had adopted FOI legislation, Botswana's independence constitution may have had both access to information and freedom of expression equally protected as human liberties.

However, engrained in Botswana's guarantee is the obligation for the government of Botswana to facilitate freedom of expression. Therefore, the government of Botswana is equally obliged to facilitate access to information. The shortfall of Botswana's constitutional guarantee in which access to information is implied fits into the limitations discussed in section 4.6.2. In view of the limitations, although access to information is implied, it is expressed as a pledge which needs to be implemented. Consequently, the pledge is in need of a framework which will create a viable access to information environment.

³⁷⁵ See section 4.2.2.

A respondent in Botswana has observed that citizens of that country:

do not have any specific right or an act which can confer a specific right on us to demand some information, and on that basis, efforts by any citizen will be easily frustrated because we do not have such facility...this kind of hinders some free flow of information because the only thing that you can fall back on is the constitution, which constitution is not very specific or very clear.³⁷⁶

The same respondent added that the constitutional guarantee underpins access “in a very general manner...for the simple reason that it is so general, it does not provide for the right of an individual with a good amount of certainty.”³⁷⁷ The constitutional underpinning of access to information in Botswana has not been translated into a practicable measure. Citizens still find it difficult to gain direct access to official information save that which government has found it worthy to disclose or is already archival in nature. As one UK respondent has commented regarding Botswana:

I think an enabling legislation is necessary. That is, culturally people are very protective of their information anyway...Information is power, it has always been and it will be, and there is a natural tendency to keep it and not share it. Information sharing is another cultural change. Having an enabling legislation is essential because you can threaten people with the legislation. Constitutional guarantees are too general, too broad and do not give clear guidelines.³⁷⁸

Access to information by citizens in Botswana is at “the mercy of whoever has the information.”³⁷⁹ In a democracy, such as Botswana, access to information should not be left to the whim of government. The country needs a more practicable measure which will enable citizens to gain direct access to other information to supplement the ones which government would have disclosed. Due to this shortcoming one respondent in Botswana has argued that citizens need “something which is forthcoming, which is very clear on what kind of information, which determines the bounds and limit of the access.”³⁸⁰ As Chapter 5 has shown, the pledge to facilitate access to information carried in a constitutional guarantee is made tangible and practical through the adoption of FOI legislation. Although access to information has

³⁷⁶ Personal interview with BW/4, 02/08/04.

³⁷⁷ Personal interview with BW/4, 02/08/04.

³⁷⁸ Personal interview with UK/3, 30/01/04.

³⁷⁹ Personal interview with BW/4, 02/08/04.

³⁸⁰ Personal interview with BW/4, 02/08/04.

capacities to reverse information asymmetries and state secrecy, this can only be made possible when access to information has been turned into a practical right.

Currently, the constitutional guarantee through which access to information is implied has failed to create a practical access platform. The failure of the guarantee in creating an access framework depicts the difficulty which citizens face in gaining access to official information. For access to be facilitated the government of Botswana should have seen the need to inform citizens. Where citizens feel they need to gain access to some official information which the government has not released or is refusing to disclose, they have the option of taking up the matter with the court.³⁸¹

Approaching the courts to force government into allowing access to some information it had denied access to is costly and time consuming, and can not be afforded by all Batswana. Further, in their ruling, the courts can uphold government's refusal to accede to access. Approaching the courts therefore is subject to the rule of probability where access can be ordered or denied. Matters of access contention should have court intervention as the last resort. All the case study countries which have adopted FOI legislation, except South Africa, have access adjudications entrusted to the Information Commissioners. These are easier to access than the courts since their sole purpose is having oversight over access to information. When Botswana adopts FOI legislation, it will not only create a viable and equitable access framework but it should also set up an access mediator with the courts as the last option.

When the UK included access to information as part of the freedom of expression guarantee, it seems it was preparing Botswana to be able to comply with the international and regional treaties it was ultimately going to ratify, particularly the ICCPR and the Declaration of Principles on Freedom of Expression in Africa. However, these treaties demand that signatories should give practicable effect to freedom of expression which includes also access to information.³⁸² By underpinning access through the guarantee and without giving it full practicable effect, Botswana is not fully complying with both Article 19 of the ICCPR and the Declaration of

³⁸¹ See section 4.5.3.

³⁸² See section 4.2.

Principles on Freedom of Expression in Africa. The environment which the country has created to facilitate freedom of expression is restrictive and premised on the sole control government has over official information. Citizens of Botswana can not shape their own access needs or request direct access to information which will address their individual knowledge requirements.

The fundamental nature of freedom of expression and the implied access to information warrants that both rights are made practical in Botswana. The government can provide access to information with a view of effectuating the constitutional pledge to guarantee freedom of expression. The limitation with this is that the information which government discloses will not address the freedom of expression needs of all citizens. This results from the failure of the guarantee to create an access framework which citizens can individually evoke whenever they feel the yearning to gain knowledge into the various aspects of governance. This restricted access to information limits the proficiency of freedom of expression. If Botswana adopts an FOI law, access to information will become dynamic and significant to both the socio-economic and political needs of both government and citizens. The capacity of freedom of expression will also become more effective to the individual desires of the Batswana.

7.2.2 The need for FOI emerging from the National Archives Act

The National Archives Act of 1978 is the only legal instrument which makes direct access to information practicable for citizens of Botswana.³⁸³ However, this legislation facilitates access only to those records which have been declared archival. This legislation therefore denies citizens the opportunity to gain direct access to records which are more current and relevant to the governance process.

The Botswana National Archives Act was enacted to establish the National Archives of Botswana which in 1992 was transformed into BNARS. This Act provides the Director of BNARS with the responsibility of inspecting public records

³⁸³ Botswana Government *National Archives Act* (Gaborone: Government Printer, 1978).

and selecting archival records from them for preservation. Through section 12 of this law, citizens are proffered with a legal right of access to the archival records after 20 years following their creation. Nevertheless, access is not always guaranteed to all archival records since the minister under whom BNARS falls, can issue a directive forbidding the disclosure of certain archival records.³⁸⁴

Other factors can also affect the ability of citizens in their quest to gain access to archival records. One of these is the existence of records backlog awaiting appraisal to select those that are archival. One respondent in Botswana observed that “we have a lot of information in the records centre, information which should be open as archives and is long overdue to be opened.”³⁸⁵ Where backlogs exist, citizens are forced to wait until the archival records have been identified and added to the archival collection which can then be made available for access.

The selection process which is used to identify archival records is also problematic. Although archivists of BNARS follow certain acquisition policies and guidelines when selecting archival records, a great majority of official records which do not meet the criteria end up being destroyed. It should however be known that archivists cannot preserve all public records hence the need to carry out the selection process. The fact that archivists are not able to retain and to preserve all official records suggests that the government of Botswana should establish an alternative mode of access. The alternative mode would enable citizens to gain access to the other records which may end up being destroyed. Hence, the new mode would supplement and complement access to archives by allowing citizens to gain access to other records which are yet to be archives and those that will not qualify as archives.

Botswana is a democracy which promotes and values the ability of citizens in generating and offering informed consent. The government of Botswana also values the participation of citizens in their governance. In view of this, citizens need direct access to more than just archival records if their involvement in the governance process is to be effective. They also need access to information which is current to the governance process so that they can develop and offer informed consent. If citizens of

³⁸⁴ Botswana Government *Botswana National Archives Act*: Section 12.

³⁸⁵ Personal interview with BW/6, 04/08/04.

Botswana are to hold government accountable or government has to account to them, the process cannot wait until after official records have been declared archives. Accountability is an ongoing and current process which is expected to improve the governance process. Where citizens can only gain direct access to archival records, their ability to hold others accountable or to be able to verify the accounts which have been proactively disclosed to them is static. It is static and it is constrained by the 20 year waiting period which the National Archives Act prescribes before citizens can gain direct access to some of the official records which would have survived the appraisal process.

Archival access can only, even with good selection procedures, provide limited, selective, static and retrospective access to information. Citizens have varied informational needs which cannot all be satisfied by retrospective access to archival records. At times, information which government discloses proactively into the public domain will be sufficient. At other times, citizens will need direct access to other sources which capture progressive official information not already disclosed. Therefore, the National Archives Act can only complement and supplement access to information rather than be a substitute for it.

Botswana needs a comprehensive and progressive access to information framework. The other case study countries which have adopted FOI laws have been able to build an access framework which presumes that all official information is open subject to some exemptions. As a result, citizens do not have to wait until records have become archival before they can gain access to them. The framework also enables citizens to access all the other records which with time may end up being destroyed because they do not possess qualities which make them archival. Further, the adoption of FOI laws means that citizens cannot be denied access to records because backlogs exist in processing archival material. In other words, the adoption of FOI legislation in Botswana will enable citizens to gain active access to records irrespective of their age. The National Archives' Act 20 year closure period, and the powers of the responsible Minister to veto access to archival records, will also be overridden through the access and exemption clauses of the FOI law.

If Botswana were to adopt FOI legislation, citizens will have a choice of whether to gain direct access to records which are current to the governance process or those which are archival. The choice will emanate from whether the knowledge they seek to gain is current to the governance process or relates to the activities which government would have performed in the past. Access to information which is overarching will be able to cater for the various access requirements of all the Batswana.

7.2.3 The need for FOI emerging from the Public Service Charter

The conduct and the operation of the public service in Botswana is regulated by a set of rules known as the *General Orders*.³⁸⁶ This set of rules includes amongst others, guidelines for employment in the public service; conduct of public servants; criteria for remunerations; training and development strategies for the public service; and the apportionment of public service welfare and benefits. Prefacing the set of rules is a suite of eight principles collectively called the Public Service Charter, hereafter the charter.³⁸⁷ These principles outline the foundation on which the public service in Botswana is built include: the regard for public interest; personal duty of public servants to be informed on the governance process; political neutrality of public servants; the accountability ethics expected from public servants; the desire by the public service to shun and contain corruption; the continuity of the public service; due diligence expected of public servants when transacting government functions; and the transparent execution of public affairs.³⁸⁸ In grounding these principles, the charter observes that the constitution of Botswana provides a legal foundation for the country while the public service provides its administrative function.

Through the principle of transparency, the charter observed that citizens are:

entitled to have access to non-confidential information on the operation and activities of the Public Service. Those interested in the administrative decisions or actions are entitled to be heard

³⁸⁶ Botswana Government *General orders governing the conditions of service of the public service of the Republic of Botswana* (Gaborone: Government Printer, 1996).

³⁸⁷ See Appendix 2 at page 303.

³⁸⁸ Botswana Government *General orders*: 3-5.

before decisions adverse to them are made, and to be informed of the reasons for such decisions...³⁸⁹

This intimates that citizens have access to information as one of their entitlements. This conversely creates a duty among public servants to facilitate access to the non-confidential information. It appears that this principle was reiterating the government's pledge to facilitate access to information implied through section 12 (1) of the constitution. Invariably, the pledge for transparency is premised on the existence of an access framework through which citizens would be able to gain access to non-confidential information. The principle of transparency necessitates the creation of capacities within the public service which would facilitate access to information.

Realistically, citizens cannot derive direct access to non-confidential information through the charter. The charter presents transparency as a principle but it does not prescribe how it will be effected. Further as Briscoe and Hermans have observed, the charter's status is obscure because it is unclear whether action may be taken against any public servant who disregards its provisions.³⁹⁰ The obscurity of the charter could be a result of its failure to prescribe modalities which would make the governance process transparent. It appears the charter was leaving the dictum of transparency open so that it was not imposing but became a reminder of the need for open transaction of public affairs. If this was the case for the obscurity, the desire to facilitate access to non-confidential information has also become vague. The vagueness has resulted because the charter has not prescribed the minimum requirements and guidelines through which access to non-confidential information will be made. Public servants therefore are unlikely to know how to make access to non-confidential information practicable.

Briscoe and Hermans have also established that the existence of the charter is little known within the public service in Botswana because it has not been publicised and is unavailable for public access.³⁹¹ This same observation was unearthed during

³⁸⁹ Botswana Government *General Orders*:4.

³⁹⁰ A Briscoe and H C L Hermans *Combating corruption in Botswana: a review of the relevant policies, laws and institutional capacity to combat corruption in Botswana* (Gaborone: Friedrich Ebert Foundation, 2001): 23.

³⁹¹ A Briscoe and H C L Hermans *Combating corruption in Botswana*: 23.

the interview process when some respondents in that country did not know about its existence. For instance one respondent employed by the government of Botswana asked “what do you mean by the Public Service Charter?”³⁹² when asked about her knowledge of it. The failure by the government to publicise the charter means that citizens and some public servants are unaware of the requirement for access to non-confidential information. Even if government was to publicise the charter, the effective use and application of the transparency principle would be difficult. The absence of guidelines directing the facilitation of access to information leaves public servants with the option of using their discretion in determining the non-confidential information which citizens can gain access to.

The charter is not spared of the shortcomings ascribed to constitutional guarantees.³⁹³ The non-confidential information which the charter entitles citizens to access is unclear. The charter does not state which information held by government is non-confidential and whether this applies to all the information formats which the government holds. The inference which can be arrived at is that all non-confidential information held by government should be made accessible. However, the government of Botswana can not create a viable access to non-confidential information framework which relies on suppositions. Most respondents in Botswana have revealed a lack of knowledge of any guidance that may assist public servants in determining the confidentiality or otherwise of official information. One Botswana respondent stated:

what has happened is that we just had to follow what has been in place...what would happen is that we would look at the nature of the information and evaluate it from that perspective. ‘Is it just open?’ ‘Is it anything anybody can lay their hands on?’ Or ‘is it information that you know should be behind doors?’ These are the guidelines we have used, but no specifically documented policies as such to guide us.³⁹⁴

In determining the confidentiality status of records, public servants rely on their personal feelings rather than on any established documented guidance. However, reliance on intuition to classify the content of records is bound to be inconsistent in

³⁹² Personal interview with BW/6, 04/08/04.

³⁹³ See section 4.6.2.

³⁹⁴ Personal interview with BW/6, 04/08/04.

application. It is possible that one public servant can declare a specific record confidential whilst the next will declare a related record non-confidential.

This study has nevertheless discovered the existence of a confidential guideline entitled *Botswana Government Office Security Instructions* issued by the Office of the President since 1994.³⁹⁵ This guideline contains clauses which are meant to assist public servants in determining the confidentiality of records. Since the guideline is confidential, it is little known about in the public sector because it has not been broadly disseminated. The confidential nature of the guidance and the fact that it is little known shows that the government of Botswana would not be able to facilitate access to non-confidential information across the entire public service. When public servants do not know of the existence of the guideline they will be incapacitated in determining the non-confidential information which citizens are entitled to access. The confidentiality of the document in itself creates insulation against practical access to non-confidential information.

This study has also found out that this guidance does not have clauses which could further assist public servants who have access to it in declassifying those records whose confidentiality has elapsed. As in classifying records in terms of security or for purposes of controlling access to them, public servants may follow the norm already being practiced in their respective departments. If the norm is that records will be declassified, public servants will strive to make them so. However, if the norm is that records are not being declassified because there is no known requirement to do so, then they will not be. The danger arising from this setup is that records which cease to be confidential may retain the status forever. Even those which are subjected to the records appraisal process and are found to possess archival qualities may take time before they are added to the archival collection for public access. This will result from the consultations which BNARS will have to undertake to determine from the records creators whether the confidentiality status has been superseded or is still intact. The records creators have the liberty to declare the records as still confidential, a ploy which will further delay access to potential archival material.

³⁹⁵ Botswana Government *Botswana government office security instructions* (Gaborone: Government Printer, 1994).

More complications arise when the transparency principle in the Public Service Charter declared that the:

Transparency does not, however, entitle Public Officers to breach their normal duty of confidentiality under the Public Service Act, nor does it entitle members of the public to have access to private information concerning others which is to be found in Public Service files. Transparency demands that, where possible, full information on matters of public interest should be made available by Public Officers authorised to do so to the press and public at large.³⁹⁶

Access to information espoused by the principle of transparency seems to be elusive in the sense that the charter rescinds the access when it reminds public servants of their allegiance to confidentiality. Public servants in Botswana are obliged to uphold confidentiality from two fronts. When they are employed, public servants are made to sign a *Declaration-National Security Act* form (Appendix 7) which states: "I undertake not to divulge any information gained by me as a result of my employment, except in the course of duty or as may be authorised by my superior officer..." It lists the superior officers as the President, Ministers or their assistants, Commissioner of Police, Attorney General, Permanent Secretaries, District Commissioner and Heads of Diplomatic Missions. The signing of this declaration is premised on section 4 (1) of the National Security Act which prohibits public servants from disclosing official information.³⁹⁷ It is further founded on section 37.4 of the *General Orders* which expressed that public servants are:

reminded that it is a serious offence under the National Security Act Cap 23:01 to impart confidential information gained as a Public Officer to any unauthorised person either during service or after leaving Public Service. This is particularly applicable to breaches of national security, but also covers all breaches of confidentiality in the public service.

Public servants are also expected to abide by the *Public Service Act* which reasserted in section 21 (c) that public servants are not allowed to divulge any information they create, receive, use or manage as they undertake government functions. It added that government-held information can be disclosed only by public servants entrusted with

³⁹⁶ Botswana Government *General Orders*:4.

³⁹⁷ Botswana Government *National Security Act* (Gaborone: Government Printer, 1986).

the authority to do so,³⁹⁸ signifying that not all public servants can facilitate access to information. In as much as the intentions of the transparency principle in making non-confidential information accessible are laudable, the impediment to viable access emerges from the reminder for public servants to uphold their obligation for ensuring the confidentiality of the public process.

It appears that the obscurity, with which the entitlement to access non-confidential is phrased, was meant to allow the government to exercise sole control over official information. The reminder of the need to adhere to the principles of confidentiality backs this supposition. Government has pledged to facilitate access to information in the constitution and later through the charter, and it has not passed any law to enforce this. Government in the charter and in the *General Orders* denotes the need to uphold the confidentiality of the governance process. In view of this, it has passed the *National Security Act* and the *Public Service Act* so as to enforce confidentiality. Clearly the government has created a framework where confidentiality takes precedence over access to information. Public servants will therefore prefer to deny access through showing allegiance to confidentiality than to stand accused of having made accessible information when they should not have.

The problems arising from the access difficulties imbued in the public service shows the difficulty which public servants will face if they try to implement access to non-confidential information. As a result of the limitations on access, very little official information will flow into the public domain. This little information, contended Briscoe and Hermans, is insufficient to provide citizens with a complete picture of the workings of government. As a result, it denies citizens a “fundamental means of holding elected representatives, Ministers and senior officials accountable for errors of omission or commission, including allegations of corruption, gross negligence and mismanagement.”³⁹⁹ They continued:

A common complaint by members of the public, journalists, non-governmental organisations, professional associations and diplomatic missions alike is that it has become extremely difficult to obtain non-confidential information through the conventional

³⁹⁸ Botswana Government *Public Service Act* (Gaborone: Government Printer, 1998).

³⁹⁹ A Briscoe and H C L Hermans *Combating corruption in Botswana*: 52.

channels, even on routine Government activities...Telephonic enquiries to Ministers or senior officials rarely elicit any substantive response. Letters to the appropriate public officers in Ministries and Departments simply asking for information often receive no acknowledgement or answer. The most common complaint heard is that public officials tend to refer even the most mundane questions from members of the public...to some higher authority, typically the Office of the President, presumably either to evade accountability for the disclosure or simply to avoid having to make the effort...This principle of transparency...is far from being generally observed by the Botswana Government.⁴⁰⁰

The failure by the government of Botswana to create a workable access to non-confidential information environment demonstrates a need for FOI legislation. The adoption of FOI legislation will formalise the relationship between confidentiality and access to information. Through the legislation there will be a clear determination of the inherent contradictions between confidentiality and access. FOI legislation will therefore provide clearer procedures and processes for access. In doing so, the legislation will protect secrecy and access to personal information through the exemption clauses while it is broadly set as a default towards more openness. Commenting on the need for FOI legislation in Botswana, one respondent of that country stated the “real benefit of FOI...is transparency.”⁴⁰¹ Another opined “we need to entrench transparency and accountability because if we are transparent and accountable then we are truly democratic, and we will not fear. We will have nothing to hide if we are transparent.”⁴⁰²

7.2.4 The need for FOI emerging from the requirement for more informed parliamentary process

Botswana operates a bicameral parliament system composed of the National Assembly and the House of Chiefs. The National Assembly is composed of the President, who is an ex-officio member and other elected and nominated members.⁴⁰³ The House of Chiefs is made up of the diKgosi representing certain ethnic groups or geographical locations.⁴⁰⁴ Both houses constitute the legislature and their role is to

⁴⁰⁰ A Briscoe and H C L Hermans *Combating corruption in Botswana*: 52-53.

⁴⁰¹ Personal interview with BW/1, 16/12/03.

⁴⁰² Personal interview with BW/4, 02/08/04.

⁴⁰³ Botswana Government *Constitution*: Sections 57-94.

⁴⁰⁴ See footnote 48 and Botswana Government *Constitution*: Sections 77-85.

develop and adopt laws, and to further scrutinise the conduct of the executive and public servants.

Members of parliament are prominent decision-makers in Botswana. Orton, Marcella and Baxter have argued that members of parliament rely on information to make valuable contributions to the decision making process.⁴⁰⁵ They also need information for contributing to the legislative process as well as to hold the executive accountable. The expectation is that parliamentarians should have broad based access to government-held information for them to sufficiently hold the executive accountable and to contribute to the law making process. The implication therefore is that parliamentarians should not only rely on the information which government discloses but should be capable of accessing other sources. They should also be able to gain direct access to other information which government holds but has not disclosed.

Serema observed that the executive in Botswana including public servants, enjoy unqualified access to information on the operation of government when compared to the parliamentarians.⁴⁰⁶ It appears this results from the fact that public servants including the executive, create, use and manage this information and hence can determine which of it they may make available for access to parliament. This derives from the failure of the constitutional guarantee and that of the Public Service Charter in creating an equitable access to information framework. Since the guarantee and the charter skews access in favour of the executive, parliamentarians and citizens gain little access to government-held information.

Serema's thesis about the executive and public servants having an 'iron' grip over access to information is supported by the way reports of commissions of inquiry fail to be distributed in Botswana. One Botswana respondent observed that these inquiries are "financed by the public through their tax. By taxing them obviously it is

⁴⁰⁵ R Orton, R Marcella and G Baxter 'An observational study of the information seeking behaviour of members of parliament in the United Kingdom' *Aslib Proceedings* 52:6 (2000): 207-217. Available at <<http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldAbstractOnlyArticle/Pdf/2760520602.pdf>>. Accessed 18/05/06.

⁴⁰⁶ B C Serema 'Information and institutions: the relationship between the executive and legislature in Botswana.' Available at <http://www.cais-acsi.ca/proceedings/2000/serema_2000.pdf>. Accessed 03/10/03.

in the public's interest to know their outcome."⁴⁰⁷ However, experience in Botswana as highlighted in the literature and by the respondents is that the executive has the final say on whether to release the reports into public domain. Commenting on the non-disclosure of some commission reports the same respondent avowed that "they (government) will just stockpile those commissions and nothing will be done to them, even if you have enough energy to pursue them, you can try and take them to court but chances of you succeeding are slim because you do not have anything which compels them to do so."⁴⁰⁸ Similarly, when the executive decides not to publish the findings of a commission of inquiry, parliamentarians also are denied access to the information.

The exclusive control which the executive and public servants have over public information enables them to determine which information can be disclosed as well as timing its release. As Stiglitz argued in his Oxford Amnesty lecture in 1999, where the executive and public servants have exclusive control over access to official information, secrecy is bound to exist.⁴⁰⁹ Within this environment, the executive as well as public servants are able to create insulation against being blamed and held responsible for the mistakes which government makes. If parliamentarians are deprived of timely, accurate and complete information, they will feel less confident when presenting or debating national issues. In 2006 Setsiba in the *Mmegi* newspaper reported one of the politicians in Botswana as having said that the bureaucracy of the government makes it difficult for them (opposition politicians) to gain access to official information. The politician is quoted as having said: "They (government) can easily keep you at bay and you would not have access to information if they don't want you to." He then observed that the executive and the public servants were hiding information from them intentionally.⁴¹⁰ By being deprived of information, members of the opposition in parliament are also less likely to see themselves as an alternative government. Stiglitz added that "secrecy may discourage potential competitors, not only because their prospects of success in the voting process are (rationally) reduced,

⁴⁰⁷ Personal interview with BW/4, 02/08/04.

⁴⁰⁸ Personal interview with BW/4, 02/08/04.

⁴⁰⁹ J Stiglitz 'On liberty, the right to know, and public disclosure: the role of transparency in public life.' Oxford Amnesty lecture. Available at <http://siteresources.worldbank.org/NEWS/Resources/oxford-amnesty.pdf>>. Accessed 15/03/05.

⁴¹⁰ T Setsiba 'Opposition parties claim ignorance on CKGR' *Mmegi* 23:118 (2006). Available at <http://www.mmegi.bw/2006/August/Thursday10/4232063021144.html>>. Accessed 10/08/06.

but because it increases their own subjective uncertainty about whether they can improve matters.”⁴¹¹

This should not be construed to suggest that the executive and public servants should disclose all public information. Rather, it suggests that if a more profound access to information framework existed in Botswana the varied access needs of parliamentarians would be properly met. In the absence of this framework, parliament in Botswana operates on a restricted flow of information. This therefore restrains the capacity of parliament in having substantial oversight of government’s performance; in assessing the impact of public policies and programmes; and in formulating and reviewing legislation. The parliamentary process in Botswana is therefore not adequately prepared to help reduce information asymmetries or reverse state secrecy. Even though access to information can help parliament in this feat, it is debilitated by the absence of a framework which would lessen government’s grip on official information.

The key role which parliament plays in Botswana demands that access to information by it, and the information flow to it should be flexible. The importance of access to information in the parliamentary process requires that Botswana should adopt FOI legislation. FOI legislation will supplement and enrich the information flow to parliament. Members of parliament will be able to use the legislation to undertake research into the current governance structure and processes of government. They will be able to use this information to contribute to the formulation of vibrant laws. Members of parliament would also use the information to hold government accountable and be better placed to inform their constituents on the activities and programmes that have been designed for them.

Snell and Upcher viewed FOI legislation as being designed to provide parliamentarians with access to information which would enable them loosen the grip of the executive and public servants on official information. FOI legislation can:

improve the effectiveness of parliament as a balance to executive power. The participatory role that FoI encourages could create a

⁴¹¹ J Stiglitz ‘On liberty, the right to know, and public disclosure:

more responsive relationship between the parliamentarian and their constituency...FOI legislation might lead to more productive sessions of Question Time, as members (especially Opposition members) with increased knowledge would be encouraged to ask more searching questions, and ministers would be better informed to answer them.⁴¹²

The parliamentary process in Botswana is in need of a viable access to information framework through which members will be able to gain direct access to information including the information which government would not want to disclose.

7.2.5 The need for FOI emerging from the state of public sector records management

Since the restructuring of BNARS between 1992 and 1995, the management of records management in the public sector has undergone some improvements.⁴¹³ The responsibility for public sector records management has been entrusted to BNARS. The records management staff in the government registries were all transferred into the establishment of BNARS. BNARS has also introduced a scheme of service which was meant to develop and guide the progression of a records management cadre. Through the seconding of its staff to the government registries, BNARS has resumed leadership in public sector records management. However, respondents and literature have shown that despite these improvements, public sector records management in Botswana still experiences some bottlenecks.

In 2005 *Mmegi* newspaper reported the then Ombudsman of Botswana as having remarked in his annual report for 2003/04, that there was a tendency amongst public servants to circulate incoming correspondence for up to 30 days. This he discerned had the potential to delay the execution of public functions since it took over the 30 days for the correspondence to be filed and ultimately be made available to the relevant officer for action taking.⁴¹⁴ Similarly, a respondent in Botswana asserted that “when mail comes into a certain government department, the relevant

⁴¹² R Snell and J Upcher ‘Freedom of information and parliament: a limited accountability tool for a key constituency?’ *Freedom of Information Review* 100 (2002): 34-41.

⁴¹³ See section 1.3.3.

⁴¹⁴ P Molaodi ‘Bureaucratic delays breed corruption-Ombudsman.’ *Mmegi* 22:135 (2005). Available at <<http://www.mmegi.bw/2005/September/Friday2/3694106458.html>>. Accessed 19/05/06.

file may not be in the cabinet. It is supposed to be in one of the offices but getting hold of that file may be difficult. On top of that, that file may contain information relating to several other persons or offices and sometimes pertains to several other matters all put together in one file.”⁴¹⁵ Another confirmed that BNARS continues to receive “complaints about misfiling. That is the most critical problem that action officers face and slow retrieval.”⁴¹⁶

Essentially problems such as these not only undermine the quality of service provided by public sector records management but also affect the efficiency and effectiveness of the public service.⁴¹⁷ When records are known to exist but cannot be found or made available to support a business function it is not only the efficacy of records management which is put under scrutiny but also the capacity of the public service in executing its functions. Public sector records management is central to the attempts by the government of Botswana to fulfil its obligations to inform citizens. Government needs access to the records it holds so as to extract and repackage information which will be disclosed. Government’s obligation to inform therefore benefits from records which are complete and retrievable.

The problems above also create a paradox for the principle of transparency which the Public Service Charter seeks to promote. The files that go missing and the correspondence which continues to be misfiled will make the identification of the information due for disclosure difficult. When this happens, the roles of access to information discussed in Chapters 4 and 5 will be circumscribed. Where files cannot be found or the information in them is incomplete, the capacity of government to account and to be held to account is compromised. If records management is not taken seriously, the information needed to drive the democratic process will be unavailable or incomplete, and this has the propensity to frustrate attainment of the *Vision 2016* ideals.

⁴¹⁵ Personal interview with BW/7, 22/10/047.

⁴¹⁶ Personal interview with BW/6, 04/08/04.

⁴¹⁷ B C Serema ‘Information infrastructure for public policymaking in Botswana:’ unpublished PhD Thesis, University of London, 2003: 186.

Records management in the public sector has to be a joint venture between BNARS staff and other public servants. BNARS has been training records management personnel and has introduced other measures which were meant to improve the delivery of services. This shows that BNARS takes records management seriously but its concerns are not equally shared across the whole of the Botswana public sector. Some decision makers still see records management as subsidiary to other public service functions. The precedence which confidentiality has over access to information can be a factor contributing to weaknesses in public sector records management. That is, the allegiance to confidentiality over access suggests that public servants see themselves as separate from the process which manages records. For them records management only matters when they require records to inform the governance processes at hand.

The lack of recognition for the importance of good records management could also be partly a result of the restructuring exercise which was undertaken between 1992 and 1995 to streamline public sector records management. Through the restructuring all records management posts and the staff complement in them were transferred to BNARS. Serema found that this aspect of the restructuring has created a dilemma in the public service. The dilemma arises because the records management staff are not regarded as part of the departments to which they are seconded. The difficulty emerging from this scenario is that, although BNARS may try to improve public records management through its staff seconded to these departments, the records management staff do not make the desired impact as they are considered alien to those departments.⁴¹⁸

Even though FOI legislation does not usually specifically require that there is a need for good records management in the public sector, the legislation's requirement for the availability of records and information for purposes of access, does imply this.⁴¹⁹ Weak records management will undermine the availability of records for both internal and external access. Once FOI legislation is adopted in Botswana, public servants will be expected to know the records and information which their department holds; how the records relate to the functions they are entrusted with; how the records

⁴¹⁸ B C Serema 'Information infrastructure for public policymaking in Botswana:' 243.

⁴¹⁹ See section 5.4.4.

can be retrieved for both internal and external access; and how the records are disposed of. Effectively, FOI legislation expects public servants to be involved in the management of records so that they would be able to retrieve and make records and information available for access. Where public servants realise that FOI legislation has enhanced their obligation to develop and retain knowledge about the records and information they create and use, they will help promote the values of good records management.

The adoption of FOI law in Botswana will bring about a new 'voice' for records managers. BNARS has done a lot in trying to streamline public sector records management but its efforts are yet to bear the desired results. In other case study countries, records managers and records management came to be seen as central to the governance process after the adoption of FOI legislation. Botswana stands to benefit from this as well. FOI law in Botswana will create a network of information professionals within the public service. Therefore, both records managers and their clients will team up to work towards effective public sector records management.

7.3 Readiness for FOI in Botswana

The above section has established the need for FOI legislation in Botswana. The question that evolves from the now established need is whether Botswana is ready for the legislation. In assessing the readiness for FOI in Botswana, this section argues that first of all, the readiness is derived from *Vision 2016*. It states that the process which led to the inclusion of the desire for Botswana to have legislated FOI by 2016 was arrived at after assessing the readiness of the country. It then argues that the perceived democratic status of Botswana, the capacity of government to account and the ability of citizens to request government to account, including the desire by government to make improvements to managing public sector records, all show the readiness of Botswana for FOI.

7.3.1 Readiness for FOI in Botswana depicted by the *Vision 2016* goals

Vision 2016 has argued that Botswana must continue to develop its tradition of open governance. It further stated that the country should strive to uphold transparency to enable decisions made by the government, and the policies and programmes it develops to be understood by citizens. This, the vision argued, will require “open acceptance that mistakes and failures are made, and an open discussion about how policies and strategies might be improved.” It continued by stressing that at every “level, there will need to be free and informed political debate that subjects every decision and policy to careful consideration from those with differing views. Botswana’s tradition of democracy is one of its strongest assets, and it gives it the stability that it will need in the future.”⁴²⁰ The adoption of *Vision 2016* by Botswana was meant to foster and further refine democratic governance in the country.

The *Vision* document proposed that by 2016 Botswana will be “free and democratic, a society where information on the operations of Government, private sector and other organisations is freely available to all citizens. There will be a culture of transparency and accountability.”⁴²¹ By 2016, Botswana is expected to have, among other things, refined its democratic tradition to encompass a defined and viable access to information framework which will allow for the free flow of information under the auspices of FOI legislation.

It was in response to the values of *Vision 2016* that the government, through the then Minister of Presidential Affairs and Public Administration, Ian Khama, extended an invitation to media stakeholders in 1998 to make inputs towards formulation of an FOI Bill.⁴²² Another Minister in 2003 also declared that the government was collecting more information on FOI legislation.⁴²³ The importance of FOI legislation is by necessity recognised by *Vision 2016*, by ministers, and by political and policy perspective. The commitment to the national aspiration of *Vision 2016* has set a good foundation on which the legislation will be built. This, and the evolving democratic

⁴²⁰ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 54.

⁴²¹ Botswana Government, The Presidential Task Group, *Long term vision for Botswana*: 5.

⁴²² See section 1.3.2.

⁴²³ See section 1.3.2

ideals of the country, presents a sign of a clear national goal and an unambiguous indicator about the readiness by Botswana for the adoption of FOI legislation.

The World Bank has remarked that Botswana has made remarkable advances in the establishment of long-term socioeconomic and political development strategy by formulating *Vision 2016*. The institution believed that the implementation of the national aspirations contained in *Vision 2016* “requires a strong commitment and engagement of all stakeholders...”⁴²⁴ It observed that the implementation of *Vision 2016* is weakened by the absence of good indicators to monitor the progress made in the execution of the national ideals.⁴²⁵ However the Bank added that the adoption of FOI legislation as part of the national ideals “would be key to encourage more open and accountable government by establishing a statutory right of access to official records and information.”⁴²⁶

The desire for FOI to be a national aspiration and the comments made by the World Bank about *Vision 2016* show that Botswana is ready for enacting the law. The need for the law was arrived at after evaluations into the governance process revealed its importance to the democratic tradition of the country. By having the law as a component of a suite of national ideals; the ideals which have been broadly disseminated; which continue to be subjected to both national and international reviews; and the current trend adopted by the government of Botswana to predicate National Development Plans (NDP) on them; are all cumulative signs of the readiness and commitment to legislating FOI.

⁴²⁴ The World Bank, *Comprehensive Development Framework Operations Policy and Country Services Botswana: towards prosperity for all, a comprehensive development framework profile* (The World Bank, n.d.): 25-26. Available at <http://siteresources.worldbank.org/CDFINTRANET/Resources/webBotswanafinal.pdf#search=%2The%20World%20Bank%2C%20Comprehensive%20Development%20Framework%20Operations%20Policy%20and%20Country%20Services%20Botswana%3A%20towards%20prosperity%20for%20all%2C%20a%20comprehensive%20development%20framework%20profile%20%22>. Accessed 09/08/06.

⁴²⁵ The World Bank, *Comprehensive Development Framework Operations Policy and Country Services Botswana: towards prosperity for all*: 26.

⁴²⁶ The World Bank, *Comprehensive Development Framework Operations Policy and Country Services Botswana: towards prosperity for all*: 25.

The invitation which the government had extended to the media stakeholders to submit contributions for the formulation of an FOI Bill would not have been made if Botswana was not ready for the law. The contributions which these stakeholders made⁴²⁷ and their persistent questioning about the status of the FOI Bill show the cumulative readiness for FOI legislation in Botswana. The *Daily News online*, reported in 2001 that the media stakeholders were uneasy with the delays on formulating the Bill.⁴²⁸ These and other concerns about the delay in legislating FOI in Botswana emanates from the fact that the country is ready for the law.

The declaration made by the then Minister of Science, Communications and Technology in 2003 expressing that government was collecting more information on FOI legislation⁴²⁹ would not have been made if the country was not ready for adopting the law. The same Minister may have said that FOI legislation was not a priority for his ministry but the priority was with enhancing ICT capabilities in the country.⁴³⁰ This statement by the Minister suggests that his ministry wanted to develop ICT capabilities so that once FOI has been legislated then Botswana would use the technology as tools for access to information. Both statements by the minister demonstrate the country's readiness for the law and the urge to enhance its success through the application of ICT. The latter statement by the Minister can also be taken as spin doctoring to defer immediate passing of FOI law rather than signify that the country was not ready for it.

Vision 2016 therefore captures precisely the readiness of Botswana to adopt FOI legislation. The suite of ideals which compose the *Vision* were arrived at after extensive consultations. Hence, the ideals and having their fruition set out for 2016 was arrived after evaluating all their necessary logistical demands, one of which was the country's readiness for their effectuation. The combination of *Vision 2016*, the invitations and the declarations resulting from it, depict Botswana's readiness for FOI legislation. The most important thing about the readiness is that the ultimate adoption of FOI legislation in Botswana will be home grown and it will not be tied to any

⁴²⁷ Botswana Media Consultative Council *FOI Act*

⁴²⁸ Botswana Government *Daily News Online* 'Media ready to meet V-2016 goals?' Available at <<http://www.gov.bw/cgi-bin/news.cgi?id=20010118>>. Accessed 09/08/06.

⁴²⁹ See section 1.3.2.

⁴³⁰ See section 1.3.2.

conditions set by a foreign institution or a government. As a result, the commitment and dedication for the law which is currently being demonstrated by the readiness is set to continue into its implementation.

7.3.2 Readiness for FOI in Botswana depicted by the adherence to democratic ideals

Democracy, as presented in section 5.4.1, is built from among others: free and fair elections, effective participation of citizens in the process of governance, guaranteeing and protection of rights and freedoms, free and vibrant press, effective opposition, and access to information. It is through the adherence to these six principles that Botswana has been considered democratic. This section will sample only two of these principles, notably: free and fair elections, and effective participation of citizens, to distil the readiness of the country for the adoption of FOI legislation. Interrogating all these six principles will require a different study which will succinctly discern and discuss all their inherent characteristics.

Considering that effective FOI is built on democracy, the presence of stable democracy in Botswana implies that Botswana is ready for the adoption of FOI legislation. One respondent in the country has highlighted the readiness of the country for FOI legislation when he opined that “in a democratic and free society which entrenches the rule of law, Freedom of Information is very crucial.” This he expressed after observing that Botswana is a seasoned democracy which is willing to be more open.⁴³¹

Free and fair elections

Ever since independence, Botswana has continued to hold periodic, free and fair elections, a sign of its commitment to democracy. *Vision 2016* expressed that:

An integral part of good democratic process, across the broad spectrum of all political formulations, is regular free and unfettered competition for political office at every level, and the avoidance of the development of personality cults. This culture will ensure that

⁴³¹ Personal interview with BW/4, 02/08/04.

holders of office remain vigilant and allow others to show their leadership potential without any inhibition. This will also facilitate the transition of leadership without necessitating a major turnaround in fundamental socio-economic and other policies...⁴³²

Through the conduct of the elections, government anticipates that citizens will be able to select the right people to govern on their behalf, and to give them the consent to perform this duty. Batswana have developed the trust that the government will uphold the constitutional provision for periodic elections which are free and fair. Through this trust, citizens have been able to formulate and proffer the consent on others to govern. The expectation therefore is that the government should enable citizens to inform themselves so as to arrive at a mix of people who can be given the responsibility to govern.

The government of Botswana has been providing access to information for many purposes including for the facilitation of elections. However, the provision of access has been one by which government decides on the information to disclose. Through *Vision 2016* government acknowledges that it is important for citizens to be informed before they can make electoral choices. The government also believes that FOI legislation has the potential to revive, facilitate and improve the election process. Hence, by having to premise the electoral process on FOI legislation, citizens of Botswana will be able to elect people who are more qualified to scrutinise the functions of the executive and public servants. These people will be able to develop laws which suit and respond adequately to local conditions and the desires of the Batswana. As a result, Batswana will be able to contribute effectively to legislative debates and the country will be capable of having more effective and informed opposition.

The desire to gain informed consent by the government, along with the capability of citizens to formulate the informed consent, denote that access to information should not just be restricted to what government discloses. Rather, there should be a diverse and viable access network through which citizens can gain access to information which would clarify and enhance the conduct of the elections.⁴³³ In

⁴³² Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 10.

⁴³³ See section 5.5.2.

addition, access to information which is less restrictive will enable the development of sound manifestos which could put the governance process under constant scrutiny to enhance further the governance process. The conduct of regular elections which emanates from due regard to the rule of law; the respect for human rights which take cognisance of the importance of access to information for free expression; are democratic signs spelling Botswana's readiness for the adoption of FOI legislation.

Effective participation of citizens in the democratic process

In a democracy, citizens should be active participants in governance. Their participation should not begin and end with the elections but it has to extend to daily public administration. Through their participation, governments consult with citizens on matters of governance, and citizens use the same platform to influence decisions as well as to have oversight of the activities of government.⁴³⁴ Although the government of Botswana actively consults citizens on issues of governance, the discussions are specific to the information which is already in public domain. In other words, participation by citizens in the governance process is restricted to and by the information which government has made accessible.

Democracy, as Abraham Lincoln expressed in his *Gettysburg Address* in 1863, denoted a government of the people, by the people and for the people.⁴³⁵ By the same token, James Madison, the fourth President of the United States of America, in a letter of 1822 to W. T. Barry said:

A popular government, without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives⁴³⁶

The realisation of the importance of information by the government in the democracy of Botswana is conversely a sign of the readiness for the adoption of FOI legislation.

⁴³⁴ P Bishop and G Davis 'Mapping public participation in policy choices.' *Australian Journal of Public Administration* 61:1 (2002): 14-29. Available at <<http://www.blackwell-synergy.com/links/doi/10.1111/1467-8500.00255/abs/>>. Accessed 09/08/06.

⁴³⁵ R P Basler (ed.) *The collected works of Abraham Lincoln* Vol. 7 (1953-1955). Available at <<http://usinfo.state.gov/usa/infousa/facts/democrac/25.htm>>. Accessed 14/03/05.

⁴³⁶ "James Madison -a Mainstream Revolutionary" available, at <<http://www.matisse.net/files/madison.html>>. Accessed 07/04/03.

Through the disclosures for information, the government understands that citizens can be part of the governance process only when they are informed. Since taking part in the governance process denotes the capacity to exercise freedom of expression, Botswana therefore possesses the minimum requirements on which active participation can be built. The desire to inform; the capacities through which information is disclosed; and the understanding of the value of information for expression (as implied in the constitutional guarantee) are when combined, further signs of Botswana's readiness for FOI legislation. In view of Madison's statement above, the environment in Botswana is conducive to make access to official information popular. The country's democratic setup has the necessary capacities which can make citizens more knowledgeable and empower them to have complete oversight of the governance process.

7.3.3 Readiness for FOI in Botswana depicted by the capacity to account by the government and the ability of citizens to hold government to account

Accountability is at the centre of governance in Botswana. When Botswana elect representatives to government, they do so with the trust that these people will account to them for their performance. Section 6.2 has argued that citizens always expect government to account for its performance. It is through the accounting process that citizens are able to scrutinise the governance process via the accounts disclosed. Accountability also depends on the capacity of the Botswana to hold the government to account without waiting for it to determine the time appropriate to account. In Botswana accountability is multivariate: it is between citizens and parliament, cabinet to parliament, cabinet to citizens, departments and ministries to ministers, ministers to cabinet and so on. Accountability is expected to result in transparency, honesty, scrutiny and oversight, all which result from the expectation to account and the capacity to hold others accountable.⁴³⁷ Accountability in Botswana is therefore predicated on records management and access to information.

⁴³⁷ J Uhr 'Accountability, scrutiny and oversight' Background paper prepared for the Commonwealth Secretariat Canberra Workshop, May 2001. Available at http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/research_publications/research_downloads/JohnUhr.pdf>. Accessed 27/04/06.

Expressing Botswana's readiness for FOI legislation from the perspective of accountability, one respondent in that country explained that Botswana attaches:

a lot of importance towards the freedom of information act because it is key towards reducing corruption. When officials know that the non-confidential materials they are dealing with can be made available to citizens and other interested people...when they know that, they behave differently, because corruption costs government dearly...so we understand the importance of access to information by citizens and stakeholders.⁴³⁸

Essentially, Botswana would not have attached importance to FOI legislation in reducing corruption if it had not evaluated the significance of the legislation. Notably, the above statement was not made by an ordinary professional respondent but by a Minister whose ministry was expected to play a lead role towards legislating FOI in the country. To make this statement, the Minister must have looked at the capacities of the public service in enabling government to account and be held to account. He will have looked also at the readiness of the country to enact and implement FOI legislation so that government becomes more accountable and uses the law as a deterrent to corruption. It can be concluded that the Minister's statement reflected the government's stand on FOI legislation. The government had accepted the desire for the legislation as part of the country's aspirations and as a result, the government was ready for it.

James Madison, writing in the *Federalist papers* in 1788, stated that:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions.⁴³⁹

⁴³⁸ Personal interview with BW/1, 16/12/03.

⁴³⁹ J Madison 'The structure of government must furnish the proper checks and balances between the different departments' *The federalist Papers No. 51*. Available at <<http://federalistpapers.com/federalist51.html>>. Accessed 14/03/05

As Madison observed, citizens are the primary element in the accountability process. Government accounts to them and they too should be able to hold government accountable. However, accountability also necessitates 'auxiliary precautions' and these are found in good records management and through legislating FOI. Botswana's readiness for FOI legislation is shown by the acknowledgement made earlier by the Minister on the importance of FOI legislation to the country. In other words, the government of Botswana has realised that people cannot scrutinise the governance process and hold government to account when access to information is restricted.

7.3.4 Readiness for FOI in Botswana depicted by desire to have good public sector records management

The appreciation of the importance of good records management prompted the government of Botswana to restructure and integrate the responsibility of the public sector records management under BNARS. This move was aimed at improving public sector records management so as to fully support and document the execution of public functions. This development was meant to streamline and to standardise the management of public sector information resource.⁴⁴⁰ The government had realised that records management transcends all public functions. It was through records management that public functions were able to account; it was through records management that government was able to be transparent and to carry out its obligation to inform Botswana. Good records management became another of the 'auxiliary precautions' which Madison talked about.

The governance process is not static, it changes with time. The government of Botswana as a result has had to introduce refined measures which would enhance productivity in the public service and to improve its responsiveness to citizens. One such measure was the improvement to public sector records management. Following the Organisational and Methods exercise on the Ministry of Home Affairs in 1985 the government of Botswana merged into BNARS the responsibility to provide leadership in the management of public sector records. As argued in sections 1.3.3 and 7.2.5,

⁴⁴⁰ See section 1.3.3.

BNARS then went on to streamline and improve public service delivery through initiating good records management practices. Even though the initiatives are yet to bring about the desired results, the importance of records management has gained some recognition.

By seeking to improve the management of public sector records BNARS was trying to help public servants to account better and to further enable government to use the accounts in informing citizens and accounting to parliament. BNARS was also trying to enable public servants to implement the transparency principle of the Public Service Charter. Where records were not created and well managed it was almost impossible for citizens to gain access to the non-confidential information of government. Even if the conditions discussed in section 7.2.3, did allow for practicable access, weaknesses in public sector records management were going to be an impediment. BNARS knew that good records management will provide public servants with assurances that they will be able to help citizens to gain access to non-confidential records. Where records were created and were well managed by government the capacity of accountability was improved.

Botswana may have accepted the desire to legislate FOI without having assessed the capacities of public sector records management in supporting the governance process. This Botswana may have done following the trend set by the first wave of FOI adopters whose concern was enacting the law so as to enhance democracy.⁴⁴¹ Even if Botswana had followed the trend set by the first adopters, the country still has time to reflect and make the necessary amends. However, in line with the first wave of adopters, Botswana may have assumed that public sector records management was performing well. This, the government would have arrived at after having assessed the performance of BNARS. The department have made improvements and continues to make more in the management of public sector records. The government therefore must have felt assured that the information which citizens would want to access through FOI legislation could be made available.

⁴⁴¹ See section 6.5.

Consequently, FOI legislation was accepted as one of the national aspirations because the government was content that public sector records management already had the capacities required or would have them by the time legislation is enacted. The government seems to have relied on the restructuring which BNARS underwent and the progress it had made in making improvements to records management. The comfort which the government seems to have derived from the performance of BNARS and the subsequent belief that public sector records management has the capacities or will have them by the time FOI legislation is passed, are signs that the government is ready for the legislation. Even though public sector records management continues to develop, the basic level of records management provision is in place. This therefore forms the foundation on which the access to information demands under FOI legislation would be built.

7.4 Conclusion

The measures which the government of Botswana currently relies on to facilitate access to information by citizens have been obscured by certain limitations. It is these limitations which have made direct access to records and information by citizens difficult. In spite of the difficulties, Botswana proves prepared for the adoption of FOI legislation as set out in *Vision 2016*. The preparedness by Botswana for legislating FOI has been shown through establishing the need for the law including determining whether the country was ready for it.

Even though the country has numerous methods through which citizens gain access to official information, these have been found to be deficient. The first shortcoming has been identified from the constitutional guarantee on access to information. Access to information in Botswana is implied through the constitutional guarantee protecting freedom of expression. The guarantee pledges that citizens will be able to gain access to official information for purposes of unfettered expression. Even though the pledge is succinctly made, it has not resulted in any tangible framework through which citizens can gain access to official information. Citizens do gain access to information but it will be to the information which the government has determined that citizens will want access to. This, the government does, disregarding

the fact that citizens have differing information requirements and that the information it discloses will not cater for all these.

The importance which access to information attains through constitutional protection therefore is biased towards government. Through the guarantee government controls access and citizens only gain direct access if they have the resources to convince the courts that they need access to official information. It then appears that the pledge of access to information was framed as a right for government when in fact it is a fundamental human right. Botswana should legislate FOI so as to allow citizens to gain direct access to official information rather than rely on the disclosures which the government makes.

The need for passing FOI law in Botswana is also obtainable from the limitations of the National Archives Act of 1978. Although the Act does create a framework through which citizens can gain direct access to records, its application is only to archival records. Citizens are therefore unable to gain direct access to other records which do not attain the archival status and are due for destruction. When these records are destroyed, citizens are denied access to the information they contain. Even the records which become archival do not do so until 20 years following their creation. In other words, citizens are expected to wait for 20 years to gain access to those records which have been found worthy to retain permanently.

The failure of the Public Service Charter to broaden access to official records beyond those that are archival has also shown a need for promulgating FOI legislation. The charter through the transparency principle has given citizens of Botswana an entitlement to access non-confidential official information. However, the same charter also makes it a point to remind public servants of their commitment to uphold confidentiality of government. This therefore has resulted in potential access to official information being overshadowed by confidentiality clauses in several laws of the country. Essentially, access to non-confidential information through the transparency principle is not viable as it, unlike the confidentiality expectations, is not supported by any legislation.

The parliamentary process in Botswana has also experienced restricted access to information. Parliamentarians just like ordinary citizens rely on the executive and public servants to provide them with access to information. The capacity to hold government to account; the ability to scrutinise effectively the conduct and performance of governance; and the fluency of parliament in designing laws for Botswana is hampered by the firm control government has over access to official information. The best method for access to official records by parliamentarians has been through the question-answer sessions but they in themselves are inadequate.

The partial commitment to good records management within the public service also shows the need for the adoption of FOI legislation. The law will compel public servants to know the records they create and which their departments hold and use. As a result, the law will oblige public servants to be fully involved in all initiatives which BNARS will have introduced to improve public service delivery through good records management.

This chapter has also shown that Botswana is ready for the adoption of FOI legislation. It has argued that the first and probably the most important indicator of the country's readiness is *Vision 2016*. The *Vision* had acknowledged the importance of FOI legislation and has pledged for its enactment by 2016. In line with the promises by the *Vision*, government ministers have also invited for submissions towards formulating an FOI Bill and they have also reiterated that passing of the law is still part of the plans for the government.

The continued regard for the functionality of democracy also reveals the country's readiness for FOI legislation. Just like the first wave of adopters, Botswana considers the adoption of FOI legislation as a catalyst needed to develop the democratic tradition of the country. Democracy is ever evolving and through the adoption of the law the country will be able to develop a democratic tradition which is based on the ideals and aspirations of the Botswana.

In relation to democracy, the country has also a practical environment which supports accountability. Since accountability is not static, government is forever looking out for more means to enhance the process. The adoption of FOI legislation is

one of the means. The desire to develop accountability further and to look for more modes for its improvement, are signs of Botswana's readiness for the law. Lastly, through the efforts which BNARS continues to make towards improving public service delivery through good records management, Botswana is ready for the law. Through the initiatives which are continually devised, the public service will be able to document precisely the activities of government. They will be able to make informed decisions and will have in place good records systems through which they can extract information to share with citizens or to allow them to gain direct access to them.

Botswana is fully prepared for legislating FOI. The country possesses all the four ingredients which are needed to create a viable access to information environment. Through the law, access to official information will be able to reverse state secrecy and to bring about symmetric access to official information. As a result, access to information will contribute to enhance the capacity of government to be responsible to citizens and it will enable both citizens and government to be aware of the relationship which they share. All this will be achieved through the clear and viable information networks which the adoption of FOI legislation will bring about.

Chapter 8: The learning curve and roadmap: towards FOI in Botswana

8.1 Introduction

Access to information is an important tool of government which is made practicable by means of an effective FOI regime. As Chapter 4 has argued, access to information has capacities to improve the democratic process. When there is improved flow of information citizens are better placed to offer informed consent. They are also able to shape and improve their participation in the governance process. Access to information has further capacities to address problems of information asymmetry, and help to control state secrecy. Through practical access to information government is also better placed to create a regime which protects personal privacy and the confidentiality of the governance process but at the same time promotes comprehensive information access.

The government of Botswana subscribes to the democratic ideals where access to information is considered critical to enable citizens to offer informed consent and guide their participation in their governance. The government is always finding new ways of improving its accountability processes and of developing further the trust which citizens have in it. It is also continuously making improvements in public sector records management as well as ensuring that personal privacy is protected. However, Botswana is faced with a steep learning curve in order for it to attain its *Vision 2016* aspiration of legislating FOI. FOI legislation is not an off-the-shelf package hence Botswana has to learn from the experiences of other countries which have legislated FOI and from this develop a law befitting the country's needs and aspirations.

This chapter serves two purposes. Firstly, it discusses the lessons derived from the case study countries which Botswana can learn from as it works towards adopting FOI legislation by 2016. Specifically the chapter draws out three lessons for the country. Lesson one argues that it is important for Botswana to constitutionally underpin access to information. Consequently, the country should consider adopting

an independent and more pronounced access to information constitutional clause which will supplement and complement access which is implied through the freedom of expression guarantee. The next lesson suggests that the adoption of FOI legislation as a national aspiration has to be built on the unique democratic base of Botswana. The last lesson posits that Botswana should undertake to assess the functionality of records management in meeting the administrative requirements of the public sector in tandem with other preparations being made for the adoption of FOI legislation. The premise for this is that when citizens seek to gain access to official information they do so with the hope of gaining knowledge of the operations of government. Since records document these operations, they are the best sources of information which can be relied upon to provide succinct knowledge about government.

Secondly this chapter proposes two roadmaps which can guide Botswana's preparations towards legislating FOI. The first roadmap prescribes a formulation which can facilitate the development of a law which takes cognisance of the country's indigenous democratic structure. The second roadmap is meant to make further improvements to public sector records management. Through these improvements, government will be able to ensure that once FOI legislation is adopted and implemented, records which are required for access will be available. Through both roadmaps, government will also be able to create internal and external capacities which will ensure that the FOI regime being built and good records management are overarching public programmes.

8.2 *The learning curve*

Three crucial lessons emerge for Botswana from this study. Firstly, access to information is not just the converse to freedom of expression but it is in itself a fundamental human right. It is therefore inadequate for it to be inferred through the right to free expression in the constitution of Botswana. Access to information cuts across all human rights and it deserves an independent constitutional underpinning. Consequently, it is critical that the government of Botswana should consider amending the constitution to give access to information the prominence which is commensurate with its role in the democratic process. Secondly, FOI legislation has been identified as one of the national aspirations for Botswana by the Batswana. The

preparations for the legislation should take account of the socioeconomic and political conditions of the country. Lastly, FOI legislation and good records management are independent processes which rely on each other to develop and implement an effective access to information regime. As Botswana works towards adopting and implementing FOI legislation by 2016, citizens need to be assured that the information they will need to gain access to will be created, it will be retrievable when requested, and archival material will continue to be identified and preserved for posterity.

8.2.1 Learning curve derived from constitutional guarantees on access to information

A constitutional guarantee of access to information is an important initiative which the governments of some countries can be credited as having achieved. Botswana is one such country albeit implying access as part of the guarantee of freedom of expression.⁴⁴² Underpinning access to information in the constitution, as argued in section 4.5.1, is important for two reasons. On the one hand, the government of Botswana is acknowledging that information is an important tool and output of governance. Access to this information by citizens provides them with a knowledge base and a resource from which they can understand the governance process. They can also use the information to establish how the governance process affects them, and how as individuals or collectively, they can influence its outcomes. On the other hand, the importance of access is tied to the supremacy, enforceability through the courts, and the defined procedures for the amendment of the constitution. Through the constitutional guarantee, Botswana is making a pledge that access to information is necessary and shall not be eroded or constrained. Further, even if a need arose to amend the access provision, government would carry out the amendments following laid down procedures and at the same time ensuring that the supremacy of access is retained.⁴⁴³

⁴⁴² See section 4.3.

⁴⁴³ See section 4.5-4.6.

However, the Special Rapporteur on Freedom of Opinion and Expression of the UNCHR, Abid Hussain, has made it clear through his annual reports that access to information plays a dual role in the governance process. On the one hand, access to information facilitates self expression and it is in this regard implied in the constitutional guarantee of freedom of expression. On the other hand, access to information is an independent right which facilitates many other human rights other than freedom of expression.⁴⁴⁴ Like South Africa and Malawi, Botswana has to consider guaranteeing access as an independent right so as to broaden its coverage. In this respect access to information in Botswana would become an independent right. At the same time, the access implied through the constitutional guarantee on freedom of expression will continue to complement and facilitate personal expression.

By amending the constitution to guarantee access to information as an independent right, Botswana will be enhancing its reputation for respecting the rule of law and human rights. Through this approach, Botswana will be acknowledging that the participation of citizens in a democracy transcends free expression. Hence, access to information for purposes of governance should not be restricted to freedom of expression but should be broadened to enable citizens to use it in furthering other rights which the constitution protects. This does not intimate that the government of Botswana has not been enabling citizens to access official information. The government has done this, but constitutionally this was for purposes of free expression. It was just for purposes of one constitutional right whilst others have not had a similar accord extended to them. Access to information has to facilitate the ability for Botswana to express themselves but this should not be at the detriment of other rights. Amending the constitution to underpin an independent access guarantee will not only facilitate the realisation of other fundamental human rights, it will also promote the significance of access to information in the governance process. The right will set a reminder to government that official information can be accessible by citizens if they so wish. An access to information guarantee will enable citizens to know that they have a legal and clear right which they can evoke to gain access to official information.

⁴⁴⁴ See section 4.2.2.

Botswana through *Vision 2016* has acknowledged that access to information is paramount and that it needs to be implemented through FOI legislation. The inclusion into the constitution of Botswana of an independent access to information guarantee will form the legal foundation on which FOI legislation will be built. Chapter 7 has argued that the obscurity of access to information resulting from being inferred through the right to freedom of expression, the government of Botswana has been free to decide when and with what to inform citizens. As a result, very little official information flows into the public domain. The absence of a balance which bestows on citizens a clear access to information right has given the government the upper hand to official information.

A constitutional amendment will also ensure that the transparency principle of the Public Service Charter will become viable. The entitlement to access non-confidential information will become predicated on the access to information right. Further, the promulgation of FOI legislation by 2016 will be predicated on a definite constitutional guarantee. This constitutional guarantee will therefore provide the adoption of the law with a legal benchmark. As in South Africa, the FOI law will be adopted to effectuate the constitutional guarantee. The access environment which Botswana will have created will be dual. On the one hand, access will be through the FOI law, and on the other hand, citizens will be able to evoke the guarantee to gain access to information.

Botswana should note that even though Malawi has attempted to distinguish access to information as an independent right and as facilitating freedom of expression, the country's guarantee on freedom of expression falls below prescriptions embedded in article 19 of both the UDHR, the ICCPR, article 10 of the ECHR, and the Declaration of Principles on Freedom of Expression in Africa. Merely stating in section 35 of the Malawi constitution that people have a right to freedom of expression without qualifying this guarantee makes it vulnerable to misinterpretation and possible abuse. This failure to make this qualification has the potential to hinder access to information in that citizens may obtain access but could face impediments when they express themselves. Where free expression is unclear, access to

information as a facilitator for freedom of expression becomes difficult to achieve.⁴⁴⁵ This could then lead to further developments in information asymmetries and state secrecy. This is a route which Botswana must seek to avoid when the country attempts to explicate its guarantees on access.

As *Vision 2016* has observed:

Botswana's legal system is premised upon a written constitution which contains a bill of rights that guarantees everyone fundamental human rights and freedoms without regard to race, colour, ethnic origin, creed or sex. Since independence, Botswana has had an impressive record of the observance of the rule of law, and its citizens have generally enjoyed the rights and freedom guaranteed by the constitution.⁴⁴⁶

By amending the constitution to include an independent access to information guarantee, Botswana will be building further on its impressive record on the observance of the rule of law and respect for human rights. Through independent access to information, the government of Botswana will not only seek to promote a more functional pledge on access but it will be acknowledging its importance for the democratic development of the country. An independent access to information guarantee which complements freedom of expression through which another access right is inferred, creates a holistic platform for the functionality of other human rights. Added also, this augments the capacity of Botswana in complying with Article 19 of the ICCPR and the Declaration of Principles on Freedom of Expression in Africa.

8.2.2 Learning curve derived from the recognition of FOI legislation as one of the national aspirations for Botswana

The fact that the adoption of FOI legislation in Botswana is a national aspiration presents the country with another lesson. As a national aspiration, the formulation of the law should be premised on a consultative process. Botswana should be given the opportunity to express themselves on the anticipated transparency to be generated by the law; they have to be given the opportunity to state generally their opinions on the type of access legislation desirable for the country. Since the law will not have been

⁴⁴⁵ See section 4.3.

⁴⁴⁶ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 15-16.

imposed on the country, it is only fair for the government to let the Batswana take ownership of it. Through the consultative process, the FOI law will be home grown and will have taken onboard the concerns of the Batswana.

Even though the law is a national aspiration and has to be home grown, Botswana should seek to learn from other countries which have similar legislation. The knowledge which will be gained, and to which this thesis is a contribution, will enable the country to learn from others the experiences necessary for an effective FOI regime. In view of this, the government through the then Minister of Science, Communications and Technology, declared in 2003 that it was collecting information on FOI in Sweden, Ireland and the UK.⁴⁴⁷ If this was true, however, the activity of collecting information has been obscured from the public, including the stakeholders who were invited to make submissions for an FOI Bill in 1998. It is clear that since the invitation which led to the submissions in 1998, there appears to be little or no headway made towards legislating FOI by 2016. If any progress has been made, it too has been hidden away from the public. If the latter is what is taking place, Botswana risk the law being imposed on them rather than being involved in its formulation.

8.2.3 Learning curve derived from the relationship shared by records management and FOI

Chapter 6 has discussed the various relationships which records management shares with FOI. These relationships have shown that FOI legislation is one of the many information laws a country can adopt. In grounding the three hypotheses developed in section 5.5, Chapter 6 has argued that the ability to record and to manage information and evidence through records management enhances the capacity of government to be more responsible. Once government sufficiently records information and evidence of the governance process, and citizens are able to gain access to this resource, they are able to establish the efficiency and effectiveness of government. The chapter further suggested that when a country adopts FOI legislation, more defined information networks are generated. Through these networks, organisations are able to map out the records and information which they

⁴⁴⁷ See section 1.3.2.

need to hold as well as determine how they can be accessed both internally and externally. Lastly, Chapter 6 argued that the relationship which records management shares with FOI enables citizens to be aware of the relationship they share with government.

The effective functionality of records management should not be assumed to exist when FOI legislation is being planned for or is being reviewed. Rather, there is a need to establish the efficiency of records management in creating records, making them available in support of business and as corporate memory, and in meeting any additional demands that may be brought about by external access. Records management is not built around FOI legislation. However, the legislation expects records management to be able to assure that records will provide the necessary information when requested to do so. FOI legislation should not be considered just as legislation which creates a viable access environment. It should be thought of broadly as an information policy which relies on good records management to facilitate the creation, maintenance and making of information available for access. One UK respondent has advised that:

You can only have access to information if the right information is being created in the first place. That is one area that FOI does not dwell on too much but I think it will increasingly need to be defined because the fact that, are the right records being created by the right people? Is it obvious that records are being created? It is a case in which every function within the organisation producing a documentary output can then be the subject of an inquiry.⁴⁴⁸

Even though records management exists to help organisations execute their functions, it also enables them to process access requests and to make proactive disclosures. The records result from and support the functions of organisations. Hence, when citizens express interest in gaining knowledge about a particular function of government, records will be expected to provide the information.

As Botswana plans for the adoption of FOI legislation it should consider records management as an important tool of governance and as crucial for the successful implementation of the legislation. The country has to understand that even though

⁴⁴⁸ Personal interview with UK/11, 30/04/04.

records will already be in existence, FOI legislation will present a challenge to the Botswana government to make an assurance that records will always be available and will also provide the information. The government of Botswana has therefore to understand that assurances concerning the availability of records or their capacity to provide the required information cannot be made when records management is weak.

The government will only be able to make the assurances after public sector records management has been found to be sound. The problems which the Ombudsman and others decried as discussed in section 7.2.5 should have ceased to exist. The incoming mail which circulates for up to 30 days before it is filed may be part of the records which are needed to answer an access request. For as long as files go missing or records are misfiled, the government of Botswana will not be able to declare downrightly that records exist and will provide the requisite information. FOI laws prescribe timeframes within which access to information must be provided. This includes having to locate files, locating relevant records in them, evaluating the contents against possible exemptions before copies can be made or other methods followed to allow direct access to information. These activities take place at the same time as the file is required to support other business processes to which it relates. If mail circulates for 30 days then it will not be possible to comply with the prescribed timeframe for responding to requests for access. The government of Botswana will therefore have to support the efforts of BNARS in improving public sector records management before FOI becomes law.

As the law is being formulated, Botswana may wish to learn from the experience of the UK which has crafted the importance of good records management for access purposes into its FOI legislation. This has resulted in the issuance of a records management code of practice derived from Section 46 of the UK FOI Act.⁴⁴⁹ A UK respondent has observed that the code is “an explicit recognition of how good records management underpins rights of access.”⁴⁵⁰ Even though the UK FOI

⁴⁴⁹ United Kingdom Government, Lord Chancellor's code of practice on the management of records.

⁴⁵⁰ Personal interview with UK/4, 30/01/04.

legislation does not compel organisations to create records, it encourages them to adhere to the requirements of the code, one of which is the duty to create records.⁴⁵¹

The only shortcoming of the UK records management code is its lack of statutory force. The code is non-statutory and because of this it has limited enforcement powers. However, the Information Commissioner's office in its endeavour to enforce compliance to the code, can invoke section 48 of the FOI Act to issue a practice recommendation if the records management environment of an organisation does not conform to the code. The Information Commissioner can also issue an information notice derived from section 51 of the Act to enforce the compliance. Although sections 48 and 51 were an attempt to add legal leverage to the code, UK public service organisations are not in breach of the law if they do not conform to the code, hence they cannot be penalised. Another way of enforcing conformity to the code lies in the option to name and shame public organisations in the reports the Information Commissioner makes to Parliament. As one UK respondent has observed, in being named and shamed in the reports to Parliament, the organisations which do not observe the requirements of the code may attract the interest of other public regulators like the Auditor General.⁴⁵²

If Botswana were to adopt FOI legislation which has requirements for a records management code of practice, the country should opt to make it statutory. A statutory code of practice will not depend on the goodwill of public organisations to comply with it but it will make compliance a legal obligation. Already, the efforts of BNARS towards improving records management in the public sector are not bearing the desired results because of departments working from the premise of goodwill. A statutory code will not leave good records management as an optional extra for the governance process or for meeting information needs of FOI but will make it a core component. Any FOI law that Botswana adopts should not premise its compliance on 'encouraging' departments but on defined legal obligations with defined sanctions. The FOI law should, with a statutory code, serve to remind public servants in Botswana of their legal role as custodians of the governance process.

⁴⁵¹ United Kingdom Government, Lord Chancellor's code of practice on the management of records: 11-12.

⁴⁵² Personal interview with UK/4, 30/01/04.

The importance of good records management to the governance process compels the government of Botswana to also consider turning BNARS into an independent institution along the lines of the Auditor General and the Ombudsman. An effective independent BNARS will be one which reports to Parliament like these other two institutions, and have its director appointed by the President in consultation with the Leader of the Opposition in Parliament. An independent BNARS will move away from the custodial role which the National Archives Act has established. The difficulties which BNARS face in improving public sector records management could be a result of the custodial role derived from the National Archives Act. Government departments are more likely to perceive BNARS as a custodial institution of government records than as a leader in the area. Given independence, BNARS will be able to establish itself as a leader and an authoritative force in managing public sector records.

An independent BNARS will be able to provide the requisite leadership in public sector records management. The departments will be able to develop prototype policies and standards which other departments of government will have to implement. BNARS will have the autonomy to oversee and enforce implementation and compliance to these. Where through monitoring, a department is found to be non-complying, BNARS would issue a best practice recommendation to rectify the problem. If the problem persists, BNARS could name and shame the department in its reports to parliament.

If the government of Botswana turned BNARS into an independent institution, much along the same status of the Auditor General or the Ombudsman, it will be building the department's capacity to assure that once FOI has been enacted, the law will be practicable. An independent BNARS will be able to ensure that departments are not coaxed into setting up good records management systems but do so as part of the concrete expectation of the governance process. Through an independent BNARS the government will be assured that records will be created and will be made available as and when required. Further, an independent BNARS will be able to work at the same level with the Information Commissioner, Ombudsman and the Auditor General in making improvements to access of official records.

8.3 Towards FOI in Botswana

This section outlines two roadmaps which could enable Botswana to adopt and implement effective FOI legislation by 2016. The first roadmap lays out the agenda items which Botswana has to consider as it works towards legislating FOI. It observes that Botswana's FOI legislation will be home grown but this does not mean that it can not learn from other countries which have a tradition of the legislation. The second roadmap is intended to develop further the capacities of public sector records management. The reason for the second roadmap emanates from the relationships which records management and FOI legislation share, which have been discussed in Chapter 6. Unlike the first to the third wave adopters of FOI legislation, Botswana as part of the fourth wave has to provide full assurances that access to information will be viable and operational. That is, the environment within Botswana should epitomize a truly democratic setup in which the governance process relies on records to support and document its various activities, and to use the same to account and be held to account. The two roadmaps therefore aim at creating two separate but interdependent programmes of government which are continuous and demand the commitment of the government for their success and functionality.

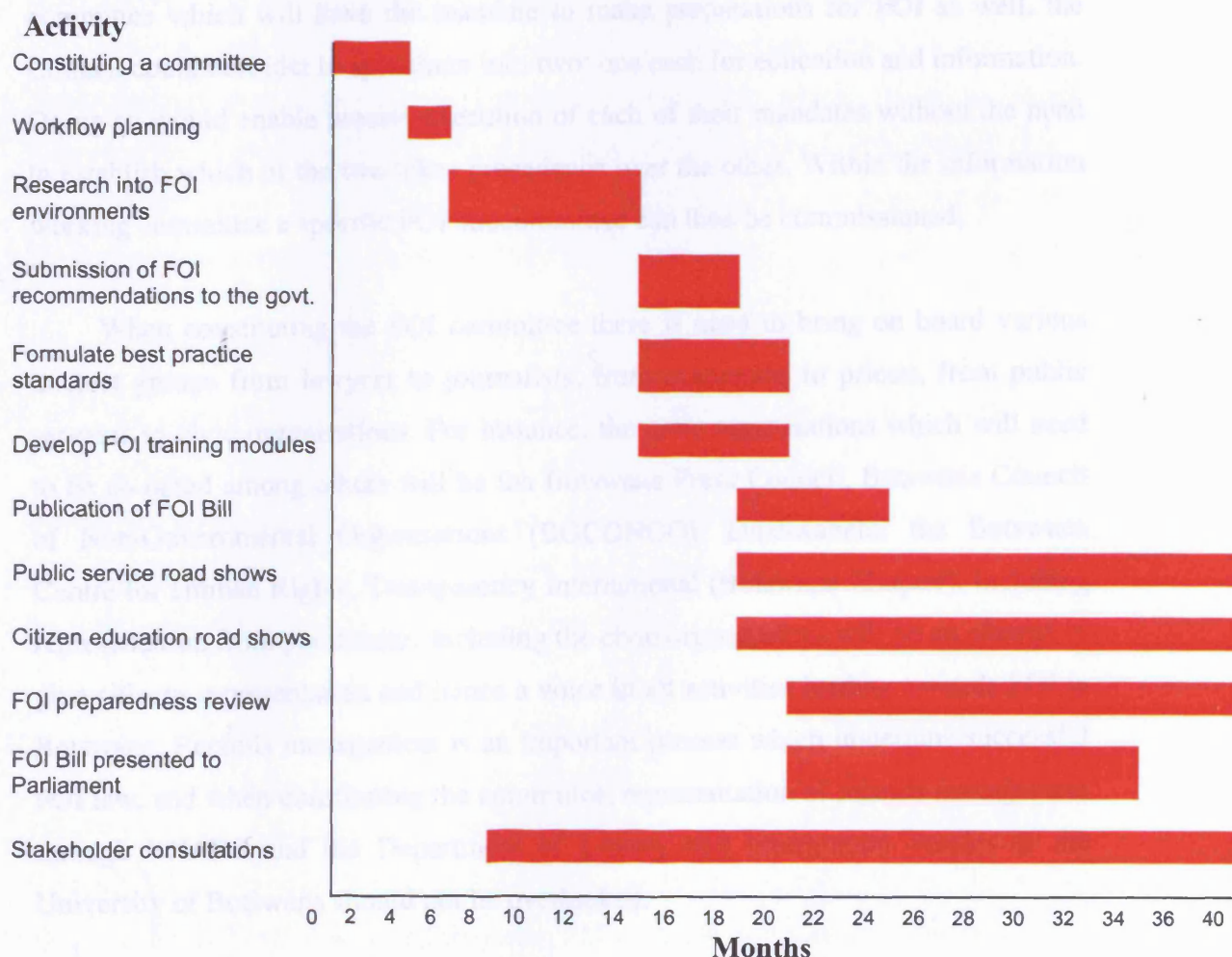
8.3.1 FOI roadmap

Legislating FOI in Botswana as part of the national aspirations envisaged for 2016 will be a complex project. When the FOI project is commissioned considerations will have to be made on the constitutionality of the proposed law; a balance will have to be struck with the protection of personal information, and also with the need to keep some official information secret. The country will also have to develop an operational framework for implementing the legislation. These and other tasks which have to be performed before the legislation is adopted and implemented demands that the project is well co-ordinated and managed.

The roadmap presented in figure 4 below outlines the processes which can help Botswana to formulate, enact and implement an effective FOI law by 2016. Since FOI is not an off-the-shelf commodity which fits into every environment it is essential that time and other resources be afforded the project.

Although the roadmap recommends that the project be spread over a 36 month period, the project lifespan can be reduced or increased to cater for other requirements which may emerge after its commencement. It is however anticipated that the project could begin as early as April 2007 with the constitution of an FOI working committee and would then end in April 2010. It has to be made clear that FOI is a programme which is continuous. The timeframe prescribed by this roadmap does not in anyway suggest that at the expiration of the 36 months all the requirements for FOI will have been achieved. The roadmap is intended to kick-start the process towards adopting and implementing FOI legislation as a programme which government and citizens will have to undertake to periodically review and to improve.

Figure 4: FOI roadmap for Botswana



- **Constituting FOI working committee**

The roadmap suggests that the first four months of the project be dedicated to constituting a working committee to spearhead the preparations for legislating and implementation of FOI legislation. This suggestion is in line with the mandate given to the Vision 2016 Council to constitute working committees to work towards the attainment of the various goals set for the year 2016.⁴⁵³ The anticipated working committees are: education and information; prosperity, productivity and innovation; compassion and caring; safety and security; openness, democracy and accountability; morality and tolerance; unity and pride.⁴⁵⁴ These committees are likely to overlap because of their broad areas of scope. However, an alternative which the Council may consider would be to devise working committees which will deal with specific and concise areas, for instance FOI legislation. Regarding the education and information committee which will have the mandate to make preparations for FOI as well, the Council could consider to split them into two: one each for education and information. Doing so would enable precise execution of each of their mandates without the need to establish which of the two takes precedence over the other. Within the information working committee a specific FOI subcommittee can then be commissioned.

When constituting the FOI committee there is need to bring on board various interest groups from lawyers to journalists, from academics to priests, from public servants to civic organisations. For instance, the civic organisations which will need to be co-opted among others will be the Botswana Press Council, Botswana Council of Non-Governmental Organisations (BOCONGO), Ditshwanelo: the Botswana Centre for Human Rights, Transparency International (Botswana Chapter), including representation from parliament. Including the civic organisations will be an attempt to give citizens representation and hence a voice in all activities leading towards FOI in Botswana. Records management is an important process which underpins successful FOI law, and when constituting the committee, representation of records management through BNARS and the Department of Library and Information Studies of the University of Botswana should not be overlooked.

⁴⁵³ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 62-64.

⁴⁵⁴ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 63.

The committee should further establish communication lines internally between members and to the Vision Council, and externally to government, parliament and to citizens. Internal communication lines are vital to sustain the development and sharing of ideas about the project. This will include making contributions towards budgeting for the project and the allocation of assignments among members. External communications will serve to keep other stakeholders abreast with the progress being made and the resources required for its sustenance.

- **Workflow planning**

Once the committee has been constituted, government through the Vision 2016 Council should furnish it with terms of reference to guide its operation. In the one month following its constitution, the committee should develop action plans derived from the roadmap above. That is, the committee should be able to dissect each of the processes that will be discussed in this section and determine what will need to be done, the activities involved, the likely costs, and other related logistical issues. However, the committee should take cognisance of the timeframe within which all the activities will have to have been accomplished. Hence, each activity entered into should have defined targets as well as their completion dates.

- **Research into FOI environments**

The next task for the committee will be to undertake research into various FOI environments. The work which this thesis has made provides the basis for the envisaged research. The main purpose of the research will be to develop an understanding of FOI, its functionality and status under constitutional, quasi-constitutional and non-codified constitutional environments.

The roadmap has allocated this aspect of the project eight months. The first six months will be dedicated to the research while the remaining two will be used to compile a report which the committee through the Vision 2016 Council will table for government's approval. Precisely this report should capture the different models of FOI which will have been researched into. The report should specify the strengths and weaknesses of each model as well as exemplify their applicability to the Botswana environment. In doing so, the report should explain how the models under scrutiny

were arrived at, the evolution processes they underwent, the challenges they have undergone including prospects which will be desirable for the FOI regime in Botswana.

The report of the committee should also highlight the best practice arrangements that have been developed from each model. These arrangements should be compared so as to identify the traits that are similar or divergent including their applicability to Botswana. The report should also show how personal privacy and certain levels of the confidentiality of the governance process are being protected while a right of access is the overall objective. In arriving at these, the committee should strive to enable Botswana to develop a law which is not a carbon copy of the ones they have researched into. Through the report, the committee should enable the FOI Bill, which will be the end product, to be one which addresses and complies to the democratic conditions of the country.

In carrying out the research, the committee should be conscious of other research initiatives that have been carried out into legislating FOI in Botswana. Section 1.3.2 has made mention that the BMCC has made some initiatives towards the formulation of an FOI Bill in 2000. Similar initiatives were made by Balule in his PhD study.⁴⁵⁵ In his study Balule argued that FOI legislation is particularly important for the media because it facilitates better flow of information to citizens, and that it enhances its watchdog role. This current thesis also carries similar initiatives and its observations should be taken into account by the committee.

Some countries after legislating FOI have considered whether to repeal and/or amend some of their laws which would otherwise be likely to impede the anticipated functionality of FOI. For instance countries like Jamaica⁴⁵⁶ after having adopted FOI legislation have considered repealing their national secrecy laws. As mentioned in section 1.3, Maripe and Balule found that similar laws exist in Botswana. One of the outcomes of the committee's research will be to identify any laws which are likely to inhibit access to information as well as to recommend what should be done about

⁴⁵⁵ See footnote 151.

⁴⁵⁶ C Campbell 'Jamaica access to information act 2002: implementing the act.' *Access to information: building a culture of transparency* (Atlanta, GA: The Carter Centre, 2006): 5-6. Available at <<http://www.cartercenter.org/documents/2364.pdf>>. Accessed 05/07/06.

them. The study which Maripe and Balule carried out should form a premise for further investigation into the matter.⁴⁵⁷

Vision 2016 also observed that one of the challenges that faces Botswana as it works toward the realisation of its ideals is to review “those laws and practices that are inconsistent with the full enjoyment of constitutional rights, to ensure their conformity with constitutional and international standards.”⁴⁵⁸ The reality that some laws may have to be reviewed, tallies with the suggestion made in section 8.2.1 on the need to adopt an explicit access guarantee while retaining the current one facilitating freedom of expression. In line with this, Botswana may seek to review the theories and practices that have enabled South Africa in particular to have underpinned access to information as a facilitator of free expression and as a separate and independent right. The committee should bear in mind that the approach which South Africa has followed has enabled that country to meet the requirements of Article 2 (2) and (3) of the ICCPR and Part IV (2) of the Declaration of Principles on Freedom of Expression in Africa.⁴⁵⁹ As *Vision 2016* mentions, it is important for Botswana to realign her national laws to comply with the country’s constitutional provisions and the requirements of international treaties. The suggestion for the adoption of a specific access guarantee will enable Botswana to fully comply with the access guarantee far much better than the current implied access permits. The output of this legal review should be made in the form of recommendations for submission to the Law Reform Committee.

The committee should also look into the transparency principle espoused by the Public Service Charter and seek to reconcile the inherent contradictions in it. Even though the adoption of FOI legislation will be premised on the belief that all official records will be accessible unless specific exemptions apply, it is crucial that the charter’s principle should support the practice of transparency which the law creates. If the contradictions are not resolved, effective implementation and use of FOI may be hindered by the fear of not showing allegiance to confidentiality by public servants. The Gomery Commission in Canada observed that the Public Service Charter is

⁴⁵⁷ BT Balule and B Maripe *A quick guide to laws and practices*

⁴⁵⁸ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 25.

⁴⁵⁹ See section 4.3.

meant to increase the morale and recognition of public servants.⁴⁶⁰ In line with this, the Commission recommended that the government of Canada should consider adopting legislation to entrench the principles which the charter promotes. This is another factor which the committee should examine. A Public Service Charter which is endorsed through a law will become known and effective in promoting the principles inherent in it. This will therefore have capacities to supplement the efforts of the public sector in implementing FOI legislation.

Related to this, the committee should gain access to the *Botswana Government Office Security Instructions*. The committee should establish the reason behind the government's desire to declare the guidance confidential and establish the other repercussions this has caused, including those in section 7.2.3. Further, the committee should establish modalities which will be followed to classify records in line with the exemptions prescribed by the FOI law and to declassify the same records once their sensitivity has waned.

The committee should also establish through their research how different countries harness ICT to enhance the capacity of government in providing access to information. This requirement is brought about by the commitment which government made in 2003 through the then Minister of Science, Communication and Technology to prioritise ICT development in the country.⁴⁶¹ The committee should evaluate the Co-ordination of Access to Information Request System (CAIRS) which the government of Canada has introduced to enable citizens to gain with ease access to official information. This system lists all the information which has been requested under Canada's FOI law; it lists also the summaries of the records released; and has online copies of the records.⁴⁶² Botswana could adopt a similar centralised FOI platform to which government departments will send information on the requests that have been received and information released to meet their demands.

⁴⁶⁰ Canada Government, J H Gomery *Commission of inquiry*: 67.

⁴⁶¹ See section 1.3.2.

⁴⁶² Canada Government, Access to Information Review Task Force *Access to information: making it work for Canadians*: 118.

- **Submission of FOI recommendations to the government**

After having evaluated the different FOI models, the committee should be in a position to make recommendations for the appropriate model befitting Botswana. The committee should have observed that implementing FOI legislation can be different across countries. For instance, Ireland⁴⁶³ and the UK⁴⁶⁴ have Information Commissioners as part of their implementation strategies while South Africa has placed a similar role on the Human Rights Commission.⁴⁶⁵ Further, even the countries which have adopted the Information Commissioner model have variations to it. For instance, Canada has two commissioners, with one responsible for the privacy law⁴⁶⁶ and the other for FOI legislation.⁴⁶⁷ However, the UK Information Commissioner has his remit extended to the country's privacy law. The South African Human Rights Commission also commissioned a study in 2003 which sought to establish the feasibility of establishing an Information Commissioner office for that country. The committee should have evaluated these and should have arrived at a recommendation which would enable Botswana implement an effective law.

The committee should also recommend that implementation of FOI in Botswana should follow a rollout method. In this approach implementation is staggered and progresses from one ministry to the next. In this way each stage of implementation is reviewed and improved upon as the project progresses.

- **Formulate best practice standards**

Once the committee has presented its recommendations on a preferred model for implementing FOI legislation in Botswana, it should develop best practice standards and guidelines which will be relied on to make the law effective. The purpose of developing the standards will be to outline benchmarks by which the FOI process will be managed. The standards will provide government departments with

⁴⁶³ Ireland Government, Office of the Information Commissioner, Ireland. Available at <http://www.oic.gov.ie/en/>. Accessed 16/08/06.

⁴⁶⁴ United Kingdom Government, Information Commissioner's Office. Available at <http://www.ico.gov.uk/>. Accessed 16/08/06.

⁴⁶⁵ South African Human Rights Commission, Access to information/PAIA. Available at http://www.sahrc.org.za/sahrc_cms/publish/cat_index_30.shtml. Accessed 16/08/06.

⁴⁶⁶ Canada Government, Office of the Privacy Commissioner of Canada. Available at http://www.privcom.gc.ca/legislation/index_e.asp. Accessed 16/08/06.

⁴⁶⁷ Canada Government, Office of the Information Commissioner of Canada. Available at <http://www.infocom.gc.ca/>. Accessed 16/08/06.

yardsticks against which to gauge their compliance to the legislation. The committee should examine the strategy employed by the UK which developed codes of practice to guide compliance with FOI legislation. The first code of practice provides a standard for creating an internal framework to enable organisations meet and perform the requirements of the law. The second code relates to improving the records management capacities in departments to create assurances that records will be accessible under the law.

Although the UK codes are not statutory Botswana should consider the argument in section 8.2.3 and the recommendations made by John Reid, the Canadian Information Commissioner to the Gomery Commission.⁴⁶⁸ In his recommendations Reid required that records management be mandatory and penalties should be imposed where there is a need. In line with this view, Botswana should consider adopting similar codes and make them statutory. Rather than just provide standards or benchmarks the codes should impose penalties for non-compliance.

The outcomes of this process will be many. Initially and probably the most important one will be to enable departments achieve the best FOI practice. Through adherence to the standards there will be consistency across government departments when handling and dealing with FOI requests and in proactive disclosures of official information. It is therefore important for the committee to recommend that each government department set up a project team through which it would prepare for adherence to the standards.

- **Develop FOI training modules**

Starting from the 15th month and running parallel to the formulation of the best practice standards should be the development of training modules. The reason for having these two processes run parallel to one another is to allow for cross-fertilisation of ideas between them. The training modules should be varied and staggered in approach. They should seek to educate the public service on the most mundane concepts and practice of access to information and over time discuss the minute applications of the law to daily administration of government. The modules

⁴⁶⁸ See section 6.2.3.

therefore will have to address various needs and concerns of implementing the law. Their focus will differ depending on the target group although certain principles will run through them all. For instance, senior managers will need to have their own set of modules and so will FOI specialists, records managers, civic organisations and ordinary citizens.

It is important that the training modules consider that FOI legislation is an alien culture and practice to Botswana. The modules should thus empower government departments through their employees to develop and implement access policies; be able to develop and maintain updated FOI manuals; and to devise strategies of evaluating internal FOI performance. The training modules should also serve to set reminders for the importance of good records management to the process of government and the bearing this has for the FOI regime. The modules should seek to inculcate a change of culture to enhance the democratic tradition of Botswana, and to generate improved accountability of the public service as well as to enhance the ability of citizens in developing and retaining of trust in the governance process.

Designing of the training modules and the training of FOI trainers will be best sourced out to consultants from countries which have diverse experience of the law. Besides inputs from the consultants, the University of Botswana should also be contracted to provide training for the public sector on FOI. The training should not end with the enactment of the law. FOI is a continuous programme which will remain intact while public servants come and go. Hence, the training should be continuous and at different levels and should enable the government and the civil society to build cumulative FOI expertise.

- **Publication of FOI Bill**

At the end of the preceding stages, the government of Botswana should be ready to draft an FOI Bill. Even though the Bill will be drafted by the Attorney General's Chambers, the participation of the committee is paramount in the process. It is the committee which will have undertaken the necessary research and will have made recommendations for a law desirable for Botswana. The committee should form close working relationships with the officials who are given the mandate to draft the Bill.

The committee should also consider co-opting a team of independent lawyers who will advise them during the drafting process. The submissions made by the BMCC in 2000 (see section 1.3.2) should also be made available to help guide the process.

The roadmap anticipates that as of the 19th month the government of Botswana should have prepared an FOI Bill for publication. Publishing the Bill will enable both national and international comments to be received, a process which can be used to make improvements on it.

- **Public service road shows**

As the legal right of access to information is alien to the public service, the committee should undertake road shows throughout the country to educate public servants about the importance of FOI and their anticipated roles in its implementation. The road shows should highlight the prospects, problems and fears which the legislation may bring about among public servants, for instance their work process and output being subjected to external scrutiny. The committee should seek to alleviate the fears and illustrate the benefits the law has for citizens and for the public service. It is the road shows which will afford the committee with opportunities to test the training modules they will have so far designed. The results of the road shows will be instrumental in refining the modules.

The task of these road shows will be to initiate and guide a shift away from the culture where public servants find it difficult to facilitate external access to information. The challenge for the committee will be to usher in a new responsibility of information sharing from the public service to citizens. This challenge will have to generate a new and most difficult change of mindset from one which was founded on 'all official information is secret' to one which stipulates that 'all official information is open unless specific exemptions apply.' The road shows will have to make public servants aware that they too are part of the broader citizenry, and that as a result, the rights and responsibilities which FOI legislation brings about affects them also.

The general outcomes of the process will be a public service which is attuned to more openness and the desire to improve its ability to be transparent to facilitate external scrutiny into its functions. The public service should be able to develop information networks which will enable them to formalise access; learn from one another on how to improve the facilitation of access and how to standardise access to similar records; and to understand and appreciate the importance of records management in access to information.

- **Citizen education road shows**

Vision 2016 advocates that a programme to educate the citizens of Botswana about their rights and responsibilities be devised. It also states that similar programmes which exist should be improved upon.⁴⁶⁹ It is imperative that as the committee strives to educate public servants on FOI, it does the same for citizens. Citizens who are knowledgeable about FOI will be able to assess the FOI Bill once it has been formulated and provide constructive feedback.

The citizen education road shows are important to educate citizens on the importance of access to information and the importance of FOI legislation in facilitating the process. The intentions of the road shows should be to explain to citizens the problems of restricted access to information i.e. information asymmetries and state secrecy. They should further train citizens on ways of formulating requests for access and how to appeal in the event access has been denied.

Just like those for the public service, the citizen road shows should not end, but have to live the life of the FOI law. Since the law is a lifetime programme, it is imperative that training of citizens on the use of the law should be a continuous process. Through the process of training, the difficulties which citizens are likely to face in gaining access should be addressed in the formulation of best practice standards. Both the design of the training modules and the conduct of the road shows should be handed over to the respective institutions which will be mandated to drive and oversee implementation.

⁴⁶⁹ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 54.

- **FOI preparedness review**

In the 20th month of the project, the working committee should endeavour to begin to evaluate the measures taken to prepare both the government and citizens for adoption of FOI legislation. The review should seek to establish general and practical understanding of the best practice standards. It should evaluate whether both public servant and citizens understand the FOI Bill as well as the rights and responsibilities that go with it, and whether they would be able to exercise them. The committee should further review the impact of the training modules on both road shows. This the committee will be able to achieve through the road shows it will conduct as well as through the stakeholder consultations discussed later in this section.

The outcomes of this review exercise should discern the levels of awareness of FOI processes within and outside government; the types of information networks that are likely to be created internally in departments, and externally across the departments and with citizens. The review should also establish whether the administrative structures anticipated to drive the implementation of FOI legislation are being prepared. Finally, the evaluation should find out the level of awareness among public servants of the records and information which their respective departments create and hold, and where they are held. In line with this, the evaluation should also determine the practical knowledge of public servants on the various policies on records management and the effects they would have in facilitating access to information under both the constitutional guarantees and FOI legislation.

- **FOI Bill presented to parliament**

The road map projects that by the 20th month the government of Botswana should be ready to table the FOI Bill to parliament. Since the parliamentary process of formulating and adopting a law is lengthy, and is subject to the times when it sits, presenting the Bill at this month will give members time to scrutinise and to comment on it. This will also give parliamentarians time to consult with their constituents and with the House of Chiefs. The process of debating the Bill and the various reading stages it will undergo, will dovetail with the preparations the committee will be evaluating as expressed above. This synergy will enable the discussions on the Bill to inform the evaluation exercise and vice versa.

- **Stakeholder consultations**

Vision 2016 posits that the views and opinions of citizens on all the national aspirations have to be obtained so as to enable Botswana withstand the challenges set to be achieved by 2016.⁴⁷⁰ It also calls for the full participation of citizens in all programmes set aside for that year: “Every Motswana must marshal his or her best energies and resources towards the realisation of the Vision.”⁴⁷¹ The roadmap prescribes that from the eighth month the FOI working committee should begin periodic consultations with the relevant stakeholders including members of parliament and citizens. The purpose of the consultative process should be to share and receive information on FOI. Through the consultations, the committee should be able to receive views and opinions which can be used to formulate an FOI model for Botswana.

When consulting with citizens the committee should use the various media available such as the radio, television, diKgotsa⁴⁷² consultations, newspaper reports, panel discussions, presentations to members of parliament, workshops and seminars, etc. During the consultations, the committee should strive to explain to all the stakeholders what FOI is; what it will do; why it is needed; and what is needed for its effectiveness including the impact it may have on the government and citizens. The expected outcomes of this process will include addressing the concerns of the stakeholders as well as gaining their support for FOI legislation.

8.3.2 Public sector records management roadmap

Since the National Archives was restructured and became BNARS there has not been a comprehensive review of archives and records management provision in Botswana. As the country braces itself for the probable adoption of FOI by 2016, there is a need to review the restructuring of BNARS including in-depth evaluation of public sector records management. Under no circumstance should the reviews be linked entirely to the anticipated adoption of FOI, but they should be focussed on the facilitation of support for public business, capture and retention of corporate memory

⁴⁷⁰ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 55.

⁴⁷¹ Botswana Government, The Presidential Task Group *Long term vision for Botswana*: 60.

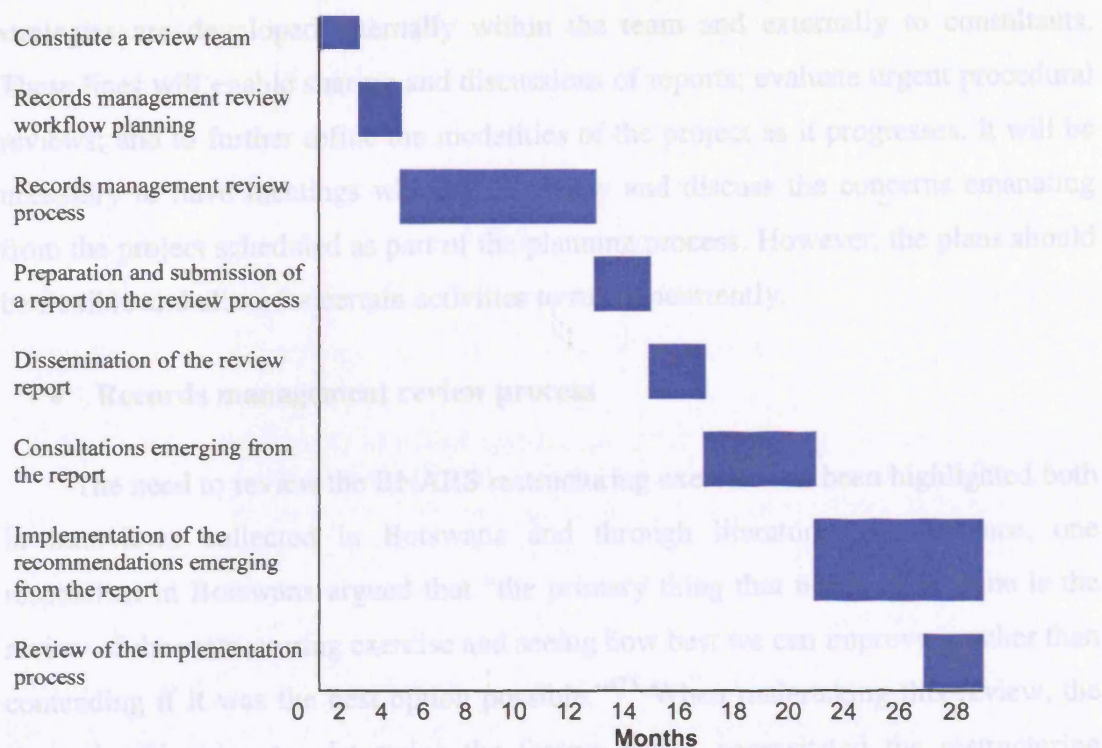
⁴⁷² See section 1.3.1.

and disposition of records. The purpose of evaluating public sector records management practices will be to establish their efficacy and to draw out the improvements which will need to be done. Figure 5 below presents a roadmap which will guide the review.

Even though the records management review can be an independent activity commissioned at any suitable time, it is critical that it should run parallel to the FOI project above. It is pertinent that the two projects be commissioned at the same time so that their findings can inform the activities which they will be tasked with. Intrinsically, both records management and FOI legislation are parallel programmes of government which are entwined and overlap. Records management is interlaced into all business activities of government while FOI legislation seeks to open them up to public scrutiny through access to the records they hold. The records management review is comparatively shorter than the FOI project but both should be subject to annual reviews. As government restructures its activities they are likely to effect changes in the public sector records management programme and in access to information requirements.

The records management roadmap prescribes the project to run for 28 months. Even though the project will last for this timeframe, it is important that after the conclusion of the project annual reviews be undertaken to determine any further improvements that may have to be carried out. The public service is not a static entity but is subject to changes which records should always address. If annual reviews are not undertaken the capacities and the capability of records management in supporting execution of public affairs may become suspect or incompatible with the changes the public service may have undergone.

Figure 5: Records management review roadmap for Botswana



- **Constitute a review team**

The review of public sector records management needs a specialised team to direct and have oversight of the project. Hence, the team should be composed of trainers, practitioners and users of records management. The composition of the team should not be restricted to BNARS staff but should include others from records management training institutions and other practitioners in the country. From among these, a project manager should be appointed to direct the execution of the project.

- **Records management review workflow planning**

After the review team has been constituted and terms of reference for the project have been handed to it, it should proceed to develop a plan of action for the exercise. The purpose of the planning is to produce guidance and to ensure that all logistical requirements for the project are identified and sourced. The review team may opt to engage consultants to carry out the review exercise. If this is the option settled for, the team should draw terms of reference for them, as well as setting timeframes and deliverables for the project.

Nonetheless, it is crucial that all the review activities are tabulated and all the outcomes identified for each. It is also essential that communication lines and strategies are developed internally within the team and externally to consultants. These lines will enable sharing and discussions of reports; evaluate urgent procedural reviews; and to further refine the modalities of the project as it progresses. It will be necessary to have meetings which will review and discuss the concerns emanating from the project scheduled as part of the planning process. However, the plans should be flexible and allow for certain activities to run concurrently.

- **Records management review process**

The need to review the BNARS restructuring exercise has been highlighted both in interviews collected in Botswana and through literature. For instance, one respondent in Botswana argued that “the primary thing that needs to be done is the review of the restructuring exercise and seeing how best we can improve it rather than contending if it was the best option possible.”⁴⁷³ When undertaking this review, the team should strive to: determine the factors which necessitated the restructuring exercise and to evaluate whether the objectives guiding its execution have been met; establish the factors which had influenced the decision to transfer all registry posts and staff pegged to them to BNARS, and whether this level of centralisation is still desirable.

The team should evaluate the practice of records management in the public sector and determine the improvements needed to bolster the service. One respondent in Botswana decried that “co-ordination of records management is poor. The co-ordination is poor because we (Records Managers) do not meet as something tangible based on any known standards.”⁴⁷⁴ Another added “the co-ordination is extremely poor and therefore in terms of records management, there is no difference between pre and post restructuring. It appears the same problems that were there initially are still here.”⁴⁷⁵ He went on to say that “there is a need for the National Archives (BNARS) to play a lead role by bringing out a records management programme. The programme will be able to attend to the records management needs of government. For instance, it

⁴⁷³ Personal interview with BW/2, 19/01/04.

⁴⁷⁴ Personal interview with BW/2, 19/01/04.

⁴⁷⁵ Personal interview with BW/3, 19/01/04.

will state 'we expect government to have attained this and that in records management at this particular time'."⁴⁷⁶ The team therefore should assess all the intricacies of managing records across the public service to evaluate the gaps, resources and the improvements that will be needed to revitalise the service towards further improving public sector delivery.

Another area which the team will have to explore has to do with the calibre of registry staff and the training they are exposed to. This area also emerged as critical during the study, for instance, there was a view in Botswana that:

maybe government should consider removing the current calibre and replacing them with a better lot. People who have been managing records over the years are not of quality...It is not that a registry demands low status personnel...If managing the heart of business is given to someone who cannot understand what business is mandated to an organisation, then we will always be having a problem.⁴⁷⁷

Concerning training of registry personnel, another respondent remarked:

we send them (registry staff)...for a one year certificate course or a two year diploma course but we are still not satisfied with the kind of output that we are getting from these officers despite our expectations...they are still coming back and not delivering what we thought they would.⁴⁷⁸

The concern arising out of the calibre and the training of registry officers elicits a serious disquiet. If the calibre and output of training these officers are subjected to does not make marked improvements to public sector records management, the question that now lingers is whether public sector records management in Botswana has the capacities needed to support government business; and whether it would be effective in taking on an added responsibility of enabling government to provide citizens with direct access to official records and information?

Even though the calibre and training are singled out, other problems may lie with the action officers served by the registry officers. It therefore is probable that the

⁴⁷⁶ Personal interview with BW/3, 19/01/04.

⁴⁷⁷ Personal interview with BW/2, 19/01/04.

⁴⁷⁸ Personal interview with BW/6, 04/08/04.

efforts of the registry officers are undermined. In view of this Serema observed that some action officers were not prompt in taking action in files brought to their attention and at other times they would remove correspondence from files.⁴⁷⁹ This observation by Serema tallies with the observation by the Ombudsman on lengthy periods of circulating mail discussed in section 7.2.5. The project team will need to investigate this issue further as the problems with records management in the Botswana public service may extend beyond the calibre and training of records officers to the perception and regard for records management by other public servants.

In addition to the above, the team should also make an assessment of the National Archives Act of 1978 and ascertain whether it supports the roles ascribed to BNARS. The Act has not undergone any changes since 1978. In the interim, records management in the public service has undergone some changes resulting from the restructuring. Many more changes have also resulted from the various reforms which have been done on the public service. It is therefore important for such assessment to be made.

- **Preparation and submission of a report on the review process**

By the 14th month a report of the review exercise should have been made and presented. If the option was to engage consultants, by the 13th month these should have compiled and presented the report to the project team. It is crucial that the submission of the report is followed by a meeting in which the consultants make oral presentations so as to enable clarifications on the report to be made. The team should then submit the report to BNARS for onward submission to the government.

- **Dissemination of the review report**

Since there will be many interested stakeholders in the review exercise, the report should be disseminated to them. These will include BNARS, the Ministry of Labour and Home Affairs under which BNARS falls, the Office of the President which released the *Botswana Government Office Security Instructions*, the Permanent Secretary to the President who issued the circular which transformed the National

⁴⁷⁹ B C Serema 'Information infrastructure for public policymaking in Botswana:' 186.

Archives into BNARS, the Directorate of Public Sector Management, and the Department of Library and Information Studies of the University of Botswana, among others. The wide dissemination will enable the many stakeholders to review and engage within their establishments on the findings and recommendations made by the report.

- **Consultations emerging from the report**

It is pertinent that the dissemination of the report be followed by a consultative forum through which the report can be discussed as well as the concerns which respective stakeholders will have identified. The consultations will enable the stakeholders to support in their various capacities the recommendations which will have to be implemented. Their support is very crucial in that the report could recommend major changes to the structure of BNARS and its placement within the public service. The support of the stakeholders is particularly important in the event that the National Archives Act has to undergo amendment to support the structure and the modus operandi which the report recommends.

- **Implementation of the recommendations emerging from the report**

Once the stakeholders have sanctioned that the recommendations of the report should be carried out, the project team should extend its brief to oversee implementation. It should opt for a gradual rollout approach whereby it implements the new system on one aspect of government and gradually rolls it out to the rest of the public service. This will enable the team to review its progress along the way and seek to resolve any problems which may develop.

Each ministry should be encouraged to set up its own implementation group. Once they have been set up, the project team should train them and provide them with the necessary guidance for implementing and using the new system. The team should ensure that the implementation groups are composed of a cross section of public servants, from senior managers to registry officers.

- **Review of the implementation process**

The gradual rollout approach which was recommended in the preceding section is meant to enable the project team to be able to evaluate the implementation process with relative ease. As the implementation progresses each stage undertaken should be reviewed and recommendations made for upcoming stages. However, beginning in the 28th month a comprehensive review of all completed and operational changes should be made against the objectives which have been set for the project. Reviews on the new system should be continuous. Once FOI has been adopted, the functionality of the system should be tested from two fronts: its support for internal business activities and its external functionality in providing citizens with access to records. Continuous reviews, annually as suggested above, will enable BNARS once the project has been handed over to it, to identify areas which will require further working on.

The main outcomes of the review should be:

- a) The identification of an appropriate records management structure for BNARS. The team should be able to suggest whether the department should decentralise or continue with complete centralisation of its responsibilities following the 1992-1995 restructuring exercise. The team should have also deliberated on the suggestions made in section 8.2.3 on the need to elevate the status of BNARS and provide it with some level of independence similar to that of the Auditor General and the Ombudsman.
- b) Detection of weaknesses of the public sector records management practices and recommend modalities for strengthening them. In this respect, best practice standards should be designed which will be benchmarked on ISO 15489⁴⁸⁰ and other relevant records management standards.
- c) The team should also seek to propose to government to consider including in the performance management system contracts which public servants must sign and undertake to fulfil, a clause obliging them to create, manage and make records and information accessible. The

⁴⁸⁰ International Standards Organisation *ISO 15489-1: 2001*.

inclusion of this clause would enhance the capacity of the public service in creating information and evidence of business transactions. If government accept this recommendation, it will be effectuating its obligation to inform, in that there will be assurance that records will be created and managed and available to support public business, and in providing access to information. As a consequence, government will be raising the profile of records management in the public service.

- d) In line with this, the team could also propose that the National Archives Act be amended to include a clause obliging public servants to create, manage and make available for access records and information as well as to support the system that will have been implemented.

8.4 Conclusion

Botswana has a huge task ahead of her as the country prepares for the realisations of the country's national aspirations. Particularly, the country is set to experience a sharp learning curve. This is brought about by the fact that the country may have some levels of openness and transparency but these fall short of the ones brought about by an effective FOI regime. As the then Minister of Science Communication and Technology rightly observed Botswana does not have an FOI experience and has to learn from the other countries which have it.⁴⁸¹ Since the Vision Council has been mandated to spearhead preparations for the 2016 ideals it also has the responsibility to lead in the formulation of FOI law for the country. Government should move away from the spin doctoring through which it has expressed that it was collecting information on FOI laws from the UK, Ireland and Sweden in 2003 and yet nothing has come out the process. It is crucial that the Vision Council take over this activity and set up a committee which will provide the necessary leadership through research and advice on the formulation and promulgation of the law. Unfortunately, FOI legislation is not ready made and one law in use in a specific country will not be equally applicable in another. FOI legislation for Botswana has to be developed to suit the local democratic establishment and the aspirations of the Botswana. Hence, the

⁴⁸¹ See section 1.3.2.

process leading to the formulation of an FOI Bill should be transparent and involve citizens as well as their representatives in Parliament.

Botswana expects to have adopted FOI legislation by 2016 alongside other equally important aspirations. However, the government should take cognisance of the fact that these goals are likely to end up competing against each other if their implementation is left until very late. As the discussions in section 8.3 have shown, legislating FOI is a complex process which is interactive and takes a very long time to accomplish.

This chapter has suggested two roadmaps which can guide Botswana's attempts to legislate FOI by 2016. The FOI roadmap suggests that the project towards legislating FOI should begin as early as 2007 and end in 2010. In the three years, research, consultations, training, drafting and publishing of the Bill will have been made. Following the roadmap will ensure that the country develops a law which meets its unique requirements. The roadmap has recommended some tasks for the committee which will be responsible for the project. These include detailed in-depth research into different FOI environments and from them extracting traits which could be used to formulate the law for Botswana. It is pertinent that this committee should establish proper lines of communication between itself, the Vision Council and the government. This is an important project and will require the government to finance its activities. The communications lines will facilitate preparation of the budget and accounting for its expenditure.

The records management roadmap is intended to address the problems which have been found to exist in the Botswana public service. Section 1.3.3 and Chapter 7 have argued that BNARS has made attempts to improve public sector delivery through improving the capacity of records management. The results from the initiatives which have so far been made are not what was expected. The problems highlighted will therefore impact on the capacity of the public sector in facilitating access to records once FOI has been legislated. The review of public sector records management is necessary to provide an assurance that once FOI has been legislated, records will be created in the normal course of business, with reduced misfiling and they will be accessible at any time they are required. This chapter has recommended

that both the FOI and the records management projects commence at the same time. Even though the FOI project is much longer, each project can inform the other.

Besides the roadmaps, this chapter has outlined lessons which can enable Botswana to develop and adopt a more practical access to information legislation. The first lesson has shown that Botswana should consider amending its constitution to include a specific access to information clause, which will provide the FOI law once adopted with clear constitutional benchmarks. Further, the clause will allow citizens to fall back on it when they can not gain access through the FOI law. The second lesson emanates from FOI legislation being a national aspiration for the country. The expectation therefore is that the formulation of the law be undertaken through a consultative process to enable Botswana to own and feel part of the legislation. The last lesson was derived from the relationships discussed in Chapter 6. Specifically, the adoption of FOI legislation in Botswana should be based on the assurance that public records management is strong and that it will be able to cater for external demands for access to records.

Chapter 9: Conclusions of the study

9.1 Introduction

The broad aim of this study has been to investigate Botswana's preparedness for FOI legislation. The investigation was undertaken through evaluating the country's provision of access to information to citizens and the capacities of public sector records management. To facilitate in-depth investigation, this study adopted a Grounded Theory approach and split the broad aim into the following objectives:

1. Establishing the importance of access to information to the governance process;
2. Working out the reasons behind underpinning access to information in constitutions;
3. Finding out the reasons countries enact FOI laws while having constitutional provisions for access to information;
4. Determining the role played by records management in the facilitation of access to information;
5. Exploring the importance of FOI legislation in records management processes of the public sector;
6. Unravelling and deciphering the relationships that bond records management and FOI;
7. Ascertaining Botswana's preparedness for the introduction of FOI legislation through an evaluation of its present access to information regimes;
8. Determining Botswana's preparedness for the introduction of FOI legislation through an evaluation of the current approaches to the management of public sector records.

Evaluating Botswana's preparedness for FOI legislation has been made possible by drawing from the experiences gained from within Botswana, and from Malawi, South Africa, Ireland and the UK. Botswana and Malawi regulate access to information through constitutional guarantees. Unlike Botswana, Malawi has already published an FOI Bill for public consultation. South Africa, Ireland and the UK all have adopted FOI legislation to regulate access to information. Of these three, South Africa also regulates access to information through a constitutional guarantee.

Through the experiences gained from these countries, it has been possible to also unearth some relationships that exist between records management and FOI legislation.

The purpose of this chapter is to recapitulate on the salient issues that have emerged from the study. The chapter is divided into four parts: the first part evaluates the suitability and applicability of the Grounded Theory approach to this study. It posits that the approach has been flexible and has contributed to concise identification and assessment of the relationships which records management shares with FOI legislation. It also maintains that a different method would not have yielded similar insights into Botswana's preparedness for the legislation including facilitating the discovery of the relationships.

The next part distils areas which future empirical research could explore. It discusses three areas which are closely related to this study. The first area which could be explored is derived from the three hypotheses unearthed in Chapter 5. Through the use of the Grounded Theory this study did not seek to explore or test any hypothesis or theory. Instead, the study has unearthed three hypotheses which need to be tested. Another study could seek to undertake a similar investigation but with a focus on Privacy legislation rather than on FOI. Others could seek to assess the balance between FOI and privacy.

Part three discusses the relationships the study has identified between records management and FOI legislation. It suggests that the relationships are critical and that the fourth wave of FOI adopters should seek to adhere to them and promote their existence. Even the countries which have adopted FOI legislation earlier should seek to build the relationships into their access to information regimes. Even in cases where the World Bank or IMF imposes the adoption of FOI legislation as a condition of aid or loans it should pay particular attention to the relationships in enhancing transparency.

Lastly, part four argues that Botswana is well prepared for the adoption of FOI legislation. It maintains that the country possesses the ingredients which Chapter 5 presented as critical for an effective FOI regime. It also contends that the

preparedness for the law is directly derived from *Vision 2016* which has committed the country to have enacted FOI legislation by the year 2016.

9.2 Methodology of the study

The application of the Grounded theory approach has enabled this study to critically analyse Botswana's preparedness for the adoption of FOI legislation. Consistent with Grounded Theory, this study was not based on any preconceived theory neither did it seek to confirm certain theoretical conclusions. Rather, the study worked towards the generation and application of a theory which explains the relationships which records management and FOI legislation share. The same theoretical understanding can also be used to evaluate a country's preparedness for the adoption of FOI legislation.

The use of Grounded Theory in this study has allowed flexible explorations to discern Botswana's preparedness for the legislation. Through it, the study has been able to concisely identify and interrogate the relationships which exist between records management and FOI legislation. The flexibility of the application has enabled the researcher to interact with the various respondents who are working in records management or FOI environments; those who have their functions impacted upon by both records management and FOI; those who campaign for FOI and others who use the rights the legislation bestows on citizens; and those whose countries are planning to legislate FOI.

Essentially, the use of the Grounded Theory allowed the study to build inductive reasoning and understanding of Botswana's preparedness for FOI legislation as well as to decipher the relationships between records management and FOI legislation. As mentioned in section 3.6 the inductive reasoning and understanding was brought about by the fact that when the study began, the researcher did not know all the relevant research questions for a study which sought to evaluate a country's preparedness for FOI through comparisons and explorations of countries which possesses different qualities. As a result of this intricacy, it was also difficult to arrive at a defined sampling frame before the study began. It was equally complex for the study to preconceive hypotheses which it could explore. By employing the theoretical

sampling technique complemented by snowballing, the study was able to identify respondents and through interactions with them succinct research questions were developed including the theoretical premise of the relationships and Botswana's preparedness. The flexibility of the Grounded Theory application allowed for this process since the study was not tied down to any rigid research questions, definite sample or a preconceived theory to test.

Arguably, this study could have adopted a quantitative methodology. Such a methodology would have had defined research questions, a sampling frame and a theory or hypotheses to test before the study commenced. Hence, the quantitative approach would have shifted the study from being inductive to deductive with emphasis on measuring variables in terms of quantity and frequencies so as to arrive at statistical explanations of Botswana's readiness for FOI legislation. However, quantitative methods are not appropriate for descriptive data and hence are not adequate for a study seeking to evaluate a country's preparedness for FOI legislation, let alone one which seeks to identify and explain the relationships which exist between records management and FOI legislation.⁴⁸² As section 3.2 has argued, quantitative methods would have been applicable for this study if Botswana had already enacted FOI legislation. For instance, quantitative methods would have been suitable if the study had sought to measure or quantify the types of requests for information made; the approximate timeframe taken to locate and make records available, and other similar quantifiable processes of FOI legislation.

Since this study is not just about records management or FOI legislation alone, it could have also used a mixed-method approach whereby qualitative are complemented by quantitative methods.⁴⁸³ That is, the quantitative methods would have enabled the study to quantify and measure responses so as to build a picture of how records management and FOI legislation may influence one another. In this regard, the qualitative methods would have provided descriptive detail to the variables which have been quantified. Still, the mixed-method approach would have fallen short of furthering the objectives of this study. The data it would have yielded was not

⁴⁸² N V Ivankova, J W Creswell and S L Stick 'Using mixed-methods sequential explanatory design: from theory to practice.' *Field Methods* 18:1 (2006): 3-20.

⁴⁸³ M B Miles and A M Huberman, *Qualitative data analysis*: 5.

going to be appropriate to expressly evaluate Botswana's readiness for FOI legislation. The same goes for unearthing relationships of two different yet overarching processes.

A study of this kind benefits immensely from employing the Grounded Theory technique. It is flexible and allows for in-depth explorations and meticulous evaluations to be made. The only thing which a similar study would do is to replicate this particular one but with a focus on testing the hypotheses developed in section 5.5. Such a study would enable a further succinct development of a records management-FOI theory.

The application of Grounded Theory to this study has contributed to knowledge on the preparedness of Botswana for FOI legislation. Through its use, Botswana has been found to be in possession of the minimum requirements for implementing FOI. It has also enabled the understanding that a law as important as FOI should be home grown rather than be imposed on countries as part of the terms for gaining aid or loans from the IMF or World Bank. The Grounded Theory has also contributed to the identification of the relationships which records management and FOI legislation share. The relationships will no longer be purported to exist without knowing what they are and the commonalities they share.

This study has also shown the importance of qualitative research in both fields of records management and FOI legislation. The use of Grounded Theory has enabled the study to tackle the records management-FOI relationships in a comprehensive and extensive manner. Through the originality of the data and analysis approach, the study has contributed to the comparative study on records management and FOI legislation.

9.3 Emerging ground for future empirical studies

This thesis has argued that access to information is an important tool of government. It is a tool which has the capacities to address problems of information asymmetry and state secrecy. It is also important towards developing and enhancing the democratic tradition within a country. However, the importance of access to information demands that access is guaranteed and fully operational. Access to

information through FOI legislation is thus assured when built onto democracy, accountability, trust, and good records management.

9.3.1 Studies to test the hypotheses developed in this study

Consequently, some possible future empirical research areas emerge from this study. One possible research area is derived from the hypotheses developed in section 5.5. This study unearthed these hypotheses but did not test them. A study which seeks to do this would have an option of doing it from a quantitative or qualitative perspective or using the mixed-method approach, since the hypotheses relate to implementing access to information through FOI legislation.

From a quantitative perspective a study might extract certain measurable variables from the hypotheses. For instance, in seeking to measure the capacities of FOI legislation in enhancing responsible government, a study could use questionnaires, containing questions whose results can be quantified. Basically, the quantitative approach would enable the study to provide a pool of answers from which respondents would be able to select the one appropriate to their environment. This would allow the study to tabulate answers according to the respective questions and make meaning out of them.

This study has raised the importance of balancing access with protection of personal privacy. Since access to information as a facilitator and protector of personal privacy is critical, there is a need for future empirical studies on it. Two such studies are needed. The first should seek to establish the relationships between access and personal privacy, and further detail how the balancing process can be achieved. The second should seek to evaluate the protection of personal privacy in Botswana. In both studies, it would be crucial to consider the role played by records management.

9.3.2 Studies focussed on Privacy legislation

Another possible study devolves from Privacy legislation as another aspect of access to information. Section 4.4.4 has argued that access to information also has the capacity to protect and promote personal privacy. What this means is that access to

information even through FOI legislation has to ensure that access to personal information is protected. Even so, citizens whose personal information has been collected should be able to access the information and have it corrected if it is found to be erroneous. Therefore, three research areas emerge here. The first study which can be derived would be one much along the same lines as this one. Instead of establishing the readiness of Botswana for FOI legislation, the study can instead focus on the preparedness of the country for Privacy legislation. Another could seek to apply the hypotheses in section 5.5 to a privacy environment. While the last study could try to strike a balance between Privacy and FOI laws as facilitators of access to information.

9.3.3 Other studies derived from the FOI ingredients

Further studies can be derived by researching into FOI, Privacy law or both from the perspective of the FOI ingredients discussed in Chapter 5. Although the ingredients have been discussed from an FOI viewpoint, they can similarly be applied to Privacy legislation. Therefore, potential studies can seek to situate the ingredients in FOI, Privacy or both. In so doing, these studies will need to unearth all the characteristics that make up each ingredient and interrogate them from the broader objective. For instance, a study could be framed to explore the operations and effects of accountability where privacy legislation has been adopted and FOI has not. Another alternative study could seek to evaluate the effects of accountability in both FOI and Privacy with the view of establishing similarities and differences.

Other studies could also use the ingredients to research into the Eastern European second wave of FOI legislation adopters. It was argued in section 6.5 that these East European countries sought to adopt FOI legislation so as to overcome corruption and to facilitate their transition to democracy. The studies would establish the functionality of democracy and the other ingredients in creating the minimum requirements for an effective access to information regime. Alternatively, this study may be replicated using case study countries with similar characteristics as the ones used in this one. For instance, countries like China which are trying to gain some levels of transparency could be compared with others who have adopted the law, so as

to establish the differences, similarities and what will have to be done to reach the ideal.

9.4 Records management-FOI legislation relationships

Chapter 5 has argued that many countries adopt FOI legislation without undertaking feasibility studies to determine the capacities of their records management systems. The general belief in these countries is that FOI legislation facilitates access to information and this may have nothing to do with records management. However, the bulk of a government's information is in the form of records. Because of the qualities which records possess i.e. of having a content, context and structure, records may be preferred for access than other sources of information. This results from the fact that through these qualities the information which records capture would be taken to be a true reflection of the activity to which they relate. The records therefore will, apart from providing information on the activity, also provide evidence of all the processes followed when the activity was undertaken. By requesting access to records citizens will gain access to trustworthy accounts of government.

Chapter 6 has shown that records management and FOI legislation share some commonalities. Rather than be taken as separate and unrelated processes, records management and FOI legislation should be taken to work together to facilitate access. FOI legislation may create a right of access but it is records management which ensures there is something to access. In fact, records management ensures not only that information will be available for access, but also assures that government activities will create records as part of their administration. It further ensures that the records will be well managed in that they will be properly classified according to the activity which created them. The records therefore will be kept as a unit of an activity and when read through, they will provide a complete account of all the processes followed, the results obtained and the challenges faced. Records management will also ensure that the records will be made available for as long as the activity requires them. When their primary use for the activity subsides, records management will follow laid down prescriptions to determine whether the records have any archival values or whether they can be disposed of in line with the legal and other procedural

recommendations. Hence, records management will ensure that records are created and they can be accessed and if they are not available for access, it will not be as a result of foul play but it would mean the records have been disposed of legally. The reasons for their non-availability will be made known.

However, the relationship shared by records management and FOI legislation demands proactive measures which will assist citizens to identify and be able to request the records which will address their interest. Government departments through FOI are expected to inform citizens whether they hold the records requested for access or not. As departments develop publication manuals through which citizens will be able to discern the records which are accessible, further innovations will be needed. For internal purposes, departments rely on file indexes which identify a record group and the files within it as well as cross-referencing to other related files. Departments also rely on retention and disposal schedules so as to determine the prescribed retention of records as well as the disposal instructions to be followed. These are principal tools for retrieving and accessing records within departments. Due to the relationships discussed in Chapter 6 and the requirements for informing citizens whether records are held, when FOI is in place departments must tag the file indexes and retention schedules onto their publication manuals. Through the file indexes citizens will be able to find the broad record class as well as the specific file they would want to gain access to. The retention schedules will enable citizens to establish if the records they would wish to access are still held in correct recordkeeping systems, whether they have been disposed of in the normal course of business or have become archives. In so doing, departments will not only be enhancing the transparency of their compliance to FOI but will indicate that they are seeking to make their processes open as well.

Countries which have adopted FOI legislation and have not taken cognisance of the functionality of records management in supporting daily business process must evaluate their approach to access to information. Records management may be considered to be a separate process from FOI legislation. However, its support of the administrative process ensures that access to information is possible. It is pertinent that a recapitulation be made to assess the functionality of records management, to indicate any improvements which need to be made, and reveal other problems which

impede the efficiency of records management, such as reversion to orality or deliberate removal of records from files or their wanton destruction. Essentially, when countries which have adopted FOI legislation review its performance, one of areas which will need to be evaluated is the effectiveness of records management.

The countries which are yet to adopt FOI legislation should understand that such legislation may not prescribe good records management but the FOI process relies on it. Even where the World Bank or IMF finds it necessary not to issue a loan to a country without a condition for the enactment of FOI, these institutions should change tack. What they ought to do is to make legislating FOI a condition and set about a phased disbursement of the loan or aid. The phased approach should be tuned to the development of appropriate mechanisms for the effective implementation of the law. These mechanisms must ensure that citizens and public servants are properly and continually educated about the law, and that all relevant institutions and manpower are developed. They should also work towards the development of good records management systems which apart from accounting for the expenditure of the loans, will provide an assurance that records will be created and will be accessible. The World Bank and the IMF should ensure that both these programmes are developed in aid or loan recipient countries before final payments of loans or aid packages are made to respective governments.

The criticality of records management in creating a viable access to information framework demands that governments should also re-evaluate the purpose and structure of National Archival institutions. In the case study countries as in most other countries, National Archival institutions are responsible for public sector records management. They are expected to set records management standards and provide leadership in that process. For these institutions to carry out their mandate with due meticulousness, they need to be independent and operate at the same level as the Auditor General and the Ombudsman. Independent National Archival institutions will have better oversight over public records management. They will also be able to monitor and enforce standards, guidelines and provide the overall required leadership.

The independence of these institutions should be enhanced by having them report directly to Parliament. Archival institutions which have a mandate over public sector records management should transcend the custodial role which they derive from managing archival records. By providing leadership in records management, these institutions should be proactive in ensuring that good records management exists. This they can not effectively perform while they are seen only as cultural institutions. Under Parliament, the institutions will have the support of parliamentarians to push through the public service records management agenda. Where some departments become perennial records management defaulters, Parliament will know and will enforce reforms.

Another initiative which arises from the relationships between records management and FOI legislation is the need to make public servants committed to creating and supporting good records management. It is no longer feasible to expect public servants to create and take part in the management of public sector records without modalities to enforce this. As FOI laws create an obligation for public servants to facilitate access, archives and records management laws should create a similar obligation for records creation and their management. Public servants should be made to sign declarations committing them to good records management. This can be included in their performance agreement contracts and/or made part of their job descriptions. The relationships shared by records management and FOI legislation demand new discipline and commitment to good records management. Without good records management, access to information through FOI will always face problems.

9.5 Botswana's preparedness for FOI

Access to information is an important tool of government. Through it, governments in many countries have made improvements in the democratic process with citizens becoming better informed and being able to shape and direct their participation in the governance process. Access to information has also enabled governments to decrease the margins of information asymmetry, and citizens have been able to contain and reverse the growth of government secrecy. Access to information has also enabled governments to promote access while protecting the privacy of citizens.

In as much as governments have committed themselves to underpinning access to information through constitutional guarantees, these efforts have remained pledges showcasing willingness rather than creating a viable and practical access environment. The adoption of FOI legislation by countries having codified constitutions has created an environment conducive for the practical functionality of the guarantees. FOI legislation is not intended to demean the guarantees but upholds their importance and ensures that all citizens can individually or collectively use them. As Chapter 4 has argued, constitutions are founding documents which guide the conduct of government. Appropriate laws need to be enacted to turn their pledges and guidance into tangible and practical output.

Botswana has implied access to information through the freedom of expression guarantee in its constitution. This approach should be commended. However, the trend among new democracies and also in line with the observations made by Abid Hussain, the Special Rapporteur on Freedom of Opinion and Expression of the UNCHR, is for access to information to gain independent constitutional protection.⁴⁸⁴ Access to information is not limited to freedom of expression as it caters for the realisation of other human rights. The restriction which independence constitutions of former UK dependencies created for access to information is being corrected in post-independence constitutions which these countries adopt. Fundamentally, Botswana has to amend its constitution to include a clause which provides an independent access to information guarantee. This will not only guarantee that the government of Botswana pledges to facilitate access to information but it will also provide the imminent passing of an FOI legislation with appropriate benchmarks, and give citizens an alternative mode of access to information which the FOI legislation does not cater for.

Chapter 5 has posited that a country will be able to better effectuate the constitutional guarantees on access if FOI legislation is built on a democracy, accountability, trust and good records management. Democracy's central tenet is a country's citizens. It is the citizens who offer informed consent and it is they who can evaluate whether government is fulfilling their needs and promoting their aspirations.

⁴⁸⁴ See section 4.2.2.

Democracy undertakes to facilitate access to information so that citizens are informed, so that from this they can build consent. Access to information in a democracy is a norm and a tradition. When FOI legislation is adopted where access to information is already a practice, the legislation formalises and legally regulates the access process.

Since Botswana has embraced democracy from the time of her independence in 1966, its government has continued to facilitate access to information. However, having been independent and democratic since 1966 and having pledged and facilitated access to information since this time, it does not mean that Botswana should be complacent about democratic practice. As *Vision 2016* has made clear, Botswana's democracy should evolve and adapt to modern times.⁴⁸⁵ That is the reason behind the *Vision* having prescribed the adoption of FOI legislation in the country by 2016.

Access to information in Botswana, as Chapter 7 has shown, has been predicated on the constitutional guarantee, the National Archives Act, the desire to achieve transparency in the public service, and efforts by parliament. Although it may appear that these factors have created a formalised and regulated access to information framework, citizens have been subjected to restricted access. Constitutional guarantees possess inherent difficulties which limit practical access to information. They are broadly worded and have to rely on specific laws to qualify and effectuate their provisions. The transparency principle as argued in Chapter 7 makes another access to information pledge, but it too has inherent contradictions. It pledges transparency but at the same time it reminds public servants of their obligation to maintain the confidentiality of the governance process. The National Archives Act has created a practical access framework but only for archival records. Democracy in Botswana has therefore created an access regime which is not only restrictive but is also limited to the information which government feels citizens will want to access. The adoption of FOI legislation will develop more formalised access structures through which citizens will be able to gain direct access to official information.

⁴⁸⁵ See section 7.3.

The government of Botswana has embraced several measures through which it accounts to citizens. Through these measures government has availed citizens with official information who in turn have used it to hold government to account; but the capacity of citizens in holding the government to account is limited to the information disclosed. Since the desire to account and be held accountable exists, it presents the enactment of FOI legislation in Botswana with fertile ground on which to develop. FOI legislation will supplement and complement the desire to account by government as well as the capacity of holding accountable by citizens.

In an environment where citizens can give informed consent, it is expected that they will freely assess the performance of government and from it develop trust in the governance process. The Botswana government has released information into the public domain for citizens to use. However, the ability of citizens in assessing the performance of government and their capacity to develop trust has been limited by the information which has been released discretionally. This practice by the government displays a willingness to be trusted by citizens but more needs to be done.

This study has also shown that FOI legislation performs better when built on good records management. Even when FOI has not been legislated, governments rely on the information which records have captured to inform their citizens. The recognition by the government of Botswana of the importance of information signifies that it sees value in creating and maintaining records of its functions. Because of this, the adoption of FOI legislation will enable the benefits of good records management to be directly felt by citizens.

The adoption of FOI legislation has the potential to reengineer the importance of records management. Records management is at times seen as a support function to the workings of government, but the enactment of FOI legislation changes this perception. Through FOI legislation governments realise that citizens seek to gain direct access to records so that they can understand the governance process. Governments then begin to realise that they will not be able to ensure that all the processes of government are well recorded if records management is relegated to the backrooms.

This study has met the broad aim and the specific objectives it set out to explore. It has shown that Botswana is prepared for the adoption of FOI legislation, and that it possesses all the basic ingredients which are needed to facilitate the creation of a viable FOI regime. A combination of these factors signals the country's preparedness for the legislation. The study has also established the importance of access to information in the governance process. That is, access to information facilitates the democratic process and it possesses capacities to address problems brought about by information asymmetry and state secrecy. The study has also established the reasons some countries have underpinned access to information through constitutional guarantees. And it has further sought to explain the reasons why countries have passed FOI laws while still underpinning access through the guarantees. Lastly, the study has deciphered the relationships between records management and FOI legislation.

The study has also shown that the government of Botswana is generally open and that it has acknowledged the importance of good records management through the efforts which BNARS continue to make. However, Botswana will only realise the responsiveness of their government once it has enacted FOI legislation which is backed by good records management. Only through these separate but related processes, Botswana will be able to enjoy the true values and promises of participatory democracy.

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Appendix 1 Constitution of Botswana Section 12 (1)

12. Protection of freedom of expression

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

Appendix 2 Botswana Public Service Charter

The Public Service Charter



Republic of Botswana

We, the Botswana Public Service, will provide a world class service that is efficient, effective, caring and responsive to local and global challenges

VISION 2016



THE PUBLIC SERVICE CHARTER

Eight Principles which chart the course of Public Service set out hereunder:

A. REGARD FOR THE PUBLIC INTEREST

The Constitution of Botswana provides the legal foundation of the Republic, while the Public Service provides its administrative foundation. Elections may pass, and political power may ebb and flow, but the Public Service stands firm. Career Officers, serving the Government of the day without fear or favour, provide the continuity that is essential for stability and public confidence.

This Public Service Charter sets out the basic principles of Public Service, by which Officers are guided, both in their relations with each other and in their dealings with the public which they serve. It is the application of these principles over the years which has fostered a proud tradition of public service, that every Officer is expected to uphold.

The Eight Principles which chart the course of Public Service are set out hereunder:

A. REGARD FOR THE PUBLIC INTEREST

The Public Officer is a servant to the Public, and his conduct must be characterised by courtesy, humility, respect for every person, regardless of station in life, and regard for the public interest. Broadly speaking, the public interest demands respect for the law and immediate compliance with Court Orders, adherence to the principles of natural justice, full consideration of both long-term and short-term effects of administrative action, adherence to previous commitments, including international obligations, avoidance of personal interests, and the consideration of all matters relevant to any issue.

B. NEUTRALITY

The principle of neutrality encompasses not only political neutrality, but also fairness to fellow Officers and to the public, and equality of treatment. Political neutrality demands that Public Officers give of their best regardless of the government in power. It is the function of politicians to attack or defend policies. It is the function of public servants to understand these, to explain them to the public, and to implement them on behalf of the Government. Equality demands fair and equal treatment of all persons without discrimination on the grounds

of religion, gender, status, place of origin, tribe, colour or religious affiliation.

C. ACCOUNTABILITY

Cabinet Ministers are politically accountable to the public for the successes or failures of the Ministries they supervise. Permanent Secretaries are administratively accountable to the public for the performance of their Ministries. Every Public Officer is, however, accountable for the due performance of his duties and for the general successes and failures of those he supervises. Accountability carries with it the right to share the credit for successes of the Ministry, the Department, or the Public Officers themselves, but also the responsibility to share or shoulder the blame for their failures. Public accountability demands that Officers should freely and promptly admit and correct their mistakes or failures.

D. TRANSPARENCY

The principle of transparency dictates that members of the public are entitled to have access to non-confidential information on the operation and activities of the Public Service. Those interested in administrative decisions or actions are entitled to be heard before decisions adverse to them are made, and to be informed of the reasons for such decisions and of an avenues of appeal which may be open to them. This applies

equally to members of the public and to Public Officers. Transparency does not, however, entitle Public Officers to breach their normal duty of confidentiality under the Public Service Act, nor does it entitle members of the public to have access to private information concerning others which is to be found in Public Service files. Transparency demands that where possible full information on matters of public interest should be made available by Public Officers authorised to do so to the press and to the public at large. Members of the public should also have free access to Public Officers at all levels. Finally, it is a requirement of the principle of transparency that user groups and interested sections of the Public should be consulted in advance, when laws or decisions affecting their well-being are contemplated.

E. FREEDOM FROM CORRUPTION

Public confidence in the Public Service requires that the behaviour of all Officers must be above reproach. Corruption comes in many guises, and once it takes root, it is extremely difficult to eradicate. Bribery consists in the giving or receiving of improper benefits in relation to the duties of Public Officers. Rewards or inducements may include cash bribes, free participation in businesses, sexual favours, improper promotions or appointments, gifts in kind of goods and services, free holidays, and excessive entertainment. Public Officers are required not only to be on their guard against corruption, abuse

of office and influence peddling in all its forms, but actively to participate in the fight against corruption by promptly reporting all improper activities and by helping to bring offenders to justice. Where the line is blurred between what is proper and what is improper, the safe route is always to be chosen.

F. CONTINUITY

The Public Service is expected to operate in a regular and reliable manner, so that all the services which it offers to the public, including decision-making services are provided on a continuous basis. Situations of non-continuity where, for example, all key Officers in a field are away at once, so that service is interrupted or delayed, should not be permitted to occur. Similarly, continuity of knowledge and experience should not be disturbed by block transfers or relocations of Public Officers. No Officer should assume a monopoly of information or keep his riles in his head. It must be ensured that all information is available on rile and is accessible to authorised Officers. Continuity also demands that powers be delegated when sole decision-makers are absent. Continuity in the Public Service should be the guarantee of prompt and predictable service to members of the Public during all normal business hours.

G. THE DUTY TO BE INFORMED

Every Public Officer has the duty to inform himself and to keep

himself informed of all matters pertinent to his service. These include the aims and objectives of the Ministry, prevailing Government policies, the current National Development Plan, and the Training Plan and Schemes of Service applicable to his Ministry. It is the responsibility of accounting Officers to keep all Public Officers subject to their authority apprised of Government policies as they are formulated. Public Officers must also be fully conversant with the Public Service Act, the General Orders, Financial Instructions and Procedures, Supplies Regulations, Transport Regulations and all other rules governing Public Officers. It is only when they are armed with this knowledge that Officers are properly able to serve and inform the Public.

H. DUE DILIGENCE

Members of the Public Service are employed and paid by the tax-paying public. They must adhere to the highest standards of diligence and efficiency as a matter of pride and national duty. That is why Public Officers are expected to give of their best whenever required to do so at any hour of the day and during any day of the year. Due diligence requires that the concerns, complaints and applications of members of the public should be dealt with promptly and thoroughly. It requires that correspondence should be unfailingly and swiftly responded to. Finally, it requires that no Officer should permit his private interests to interfere with his duty of loyalty and continuous

performance in the service of the nation. This Public Service Charter provides the guiding principles of Public Service. In interpreting, and abiding by the General Orders which follow, Public officers must have due regard to them at all times. But they are not immutable laws, nor should they be misused or misinterpreted to justify anything which sound common sense dictates as being unfair, improper, or contrary to the public interest.

Appendix 3 Section 12 Botswana National Archives Act

CAP. 59:04]

National Archives

obtained or, if they were obtained by gift, during the life time of the donor without his consent.

(3) The Director may authorize the immediate destruction, or the destruction after the expiration of such specified period as may be agreed upon by the Director and the administrative head of the Ministry, Department, other agency of the Government or a prescribed body concerned of any specified public records that—

(a) by reason of their number, kind or routine nature do not in his opinion possess any enduring value for preservation as public archives; and

(b) are not required for reference after action is completed or after the expiration of such period of years from the date on which action on them is completed as may be agreed upon between the Director and the administrative head.

(4) Any person who destroys or otherwise disposes of any public records or authorizes the disposal or destruction of such records other than in accordance with this section shall be guilty of an offence.

Access to public
archives

12. (1) Subject to any written law prohibiting or limiting the disclosure of information obtained from members of the public and to the provisions of this section, public archives which have been in existence for a period of not less than 20 years may be made available for public inspection, and the Director or custodian of a place of deposit shall provide reasonable facilities at such times, and on the payment of such fees as may be prescribed, for the public to inspect or obtain copies or extracts from public archives in the National Archives or place of deposit:

Provided that a donor of public archives, other than public records, may specify appropriate conditions for access to such archives.

(2) Notwithstanding the provisions of subsection (1), the Minister may, in respect of any public archives or any category thereof certified to him by the person by whom or in charge of the office from which, the records concerned were transferred to the National Archives, direct in writing that—

(a) such public archives or category thereof shall not be made available for public inspection until the expiration of such further period as may be specified in that or any subsequent directive; or

(b) such public archives or category thereof may be made available for public inspection notwithstanding that such public archives have not been in existence for at least 20 years.

(3) The Minister may delegate to the Director his powers under subsection (2) to afford, restrict or withhold access to public archives.

(4) Nothing in this section shall be construed—

- (a) as limiting any right of inspection of any records to which members of the public had access before their transfer to the National Archives or place of deposit; or
- (b) subject to the extent provided for by any such written law as is referred to in subsection (1), as precluding the Minister from permitting any person authorized by him to have access to any public archives or category thereof.

13. (1) No person who is not an officer of the National Archives shall without the written authority of the Director inspect any public archives which—

Inspection of
public archives

- (a) have been transferred to the National Archives; and
- (b) (i) have been the subject of a directive made by the Minister under section 12(2)(a), or
- (ii) have not been in existence for at least 20 years, unless they are the subject of a directive made by the Minister under section 12(2)(b).

(2) Any person may inspect any public archives subject to—

- (a) the provisions of subsection (1); and
- (b) any condition or restriction imposed by the Director or the person from whom they were acquired.

(3) Subject to the provisions of subsections (1) and (2), the National Archives shall be open to the public for the inspection of public archives during such hours as may be determined by the Director.

PART V *Exportation and Removal of Archives and other Documents*

14. (1) No person shall export from Botswana any public archives except under and in accordance with the terms of a permit issued by the Director under this section.

(2) No person shall remove—

- (a) any public archives from the National Archives or a place of deposit without the written permission of the Director; or
- (b) any public record selected for, but not transferred to, the National Archives or place of deposit from its place of custody without the written permission of the Director or the person in whose custody such record is kept.

Restriction of
exportation of
or unauthorized
removal of
public archives
and public
records

Appendix 4 List of respondents

With the advice of both examiners this list for reasons of confidentiality has been excluded from the version deposited in the University of London library.

Appendix 5 Interview guides

(1) UK, Republic of Ireland, South Africa

The following questions and the order in which they appear are used as a guideline for conducting interviews for this study. The questions were reworded as and when necessary to suit a particular interview.

A. General

- Please summarise your understanding of FOI as it applies to the UK/Ireland/SA.
- Why is FOI important?
- Is FOI necessary where a country's constitution guarantees access to government information?
- What are the challenges FOI places on organisations?
- What strategies do organisations need to have in order to comply with FOI

B. Infrastructural Needs for FOI

- FOI implementation
 - What do you think are key issues in successful FOI implementation?
 - What is best practice for implementation?
 - How can we gauge that implementation is successful or failing?
 - Is there a need for an autonomous body to facilitate FOI implementation?
 - What is best practice in terms of monitoring compliance?
 - Is there a need for a body between the courts and an organisation for purposes of appeals refusals? Why/why not?

C. Records management

- Records management is regarded by many as core to FOI implementation. What do you think is its role in the process of implementation?
- Can functional FOI implementation be realised where records management is in disarray? If not why?
- What strategies should organisations have to enable records management assist in FOI implementation?
- How can FOI have an impact on the way organisations manage their records?
- How can the way records are managed have an effect on FOI implementation?
- How can the way organisations security classify records (confidential, top secret etc) impact on FOI utilisation? What may need to be done to ensure that the classifications contribute to FOI implementation?

- Is there a need to make clear responsibilities i.e. at management and operational levels to enable records management meet demands of FOI? How can this be achieved?
- Is there a need to audit records management systems for purposes of FOI? How can this be done and sustained over time?
- What do you think is the link between records management and FOI processes such as exemptions, request processing times, proactive publishing of information, compilation publication schemes?

D. Concluding questions

- Is it likely that FOI can influence the way records are created, maintained, used and disposed? If so, can you elaborate how?
- Please explain the role of an archival institution in FOI implementation?

(2) Botswana and Malawi

The following questions and the order in which they appear are used as a guideline for conducting interviews for this study. The questions are reworded as and when necessary to suit a particular interview.

A. General

- Please summarise developments leading to the constitutional guarantee to accessing government information.
- What does the constitutional guarantee really mean?
- What is the purpose, objectives, scope and coverage of the guarantee?
- How important and practicable is the guarantee?
- What are the challenges that the guarantee places on government departments?
- Have the intentions of the guarantee been met? If not why?
- How has the guarantee ensured public accountability, transparency and democracy?
- Why has Botswana/Malawi stuck to the constitutional guarantee when some countries which had similar provisions enacted FOI to give the guarantee legal backing?

B. Implementation of the Constitutional guarantee to government information

- How is the constitutional guarantee being implemented in Botswana/Malawi?
- Who oversees the implementation process?
- What are the impediments, if any to the implementation process?
- How is implementation monitored?
- How is compliance rewarded?
- How is non-compliance sanctioned?

- g. Is there an appeals process for resolving refusals for access to information? If it is there may you elaborate on the process? If there isn't, how are appeals handled?
- h. How are exemptions to access information built into the guarantee? Are there any guidelines to assist departments in determining which information to exempt? How are exemptions communicated to the public?
- i. How are response times to requests for information determined?
- j. In your view, what is best practice for implementing a constitutional guarantee of access to government information?

C. Records management

- a. What is the role played by records management in the implementation process of the guarantee?
- b. Can the guarantee be realised where records management is in disarray? If not why?
- c. Explain the processes that government departments ought to follow in ensuring that records/information are/is available to satisfy needs of requestors?
- d. What can you say has been the impact of the guarantee on records management?
- e. What would you say is the impact of records management on the guarantee?
- f. Does security classification of records (confidential, secret etc) affect access to information using the guarantee? If so, how is it resolved?
- g. How has the emergence of ICTs and especially the creation of e-records in the government affected the guarantee?

D. Concluding questions

- a. Is it likely that the constitutional guarantee to information can influence the way records are created, maintained, used and disposed? If so can you elaborate how?
- b. In some countries such guarantees have resulted in the failure to capture information/ government transactions. What is the situation/experience in Malawi?
- c. Please explain the role of the National Archives in the implementation process of the guarantee?

Appendix 6 N6 application in the thesis

Introduction

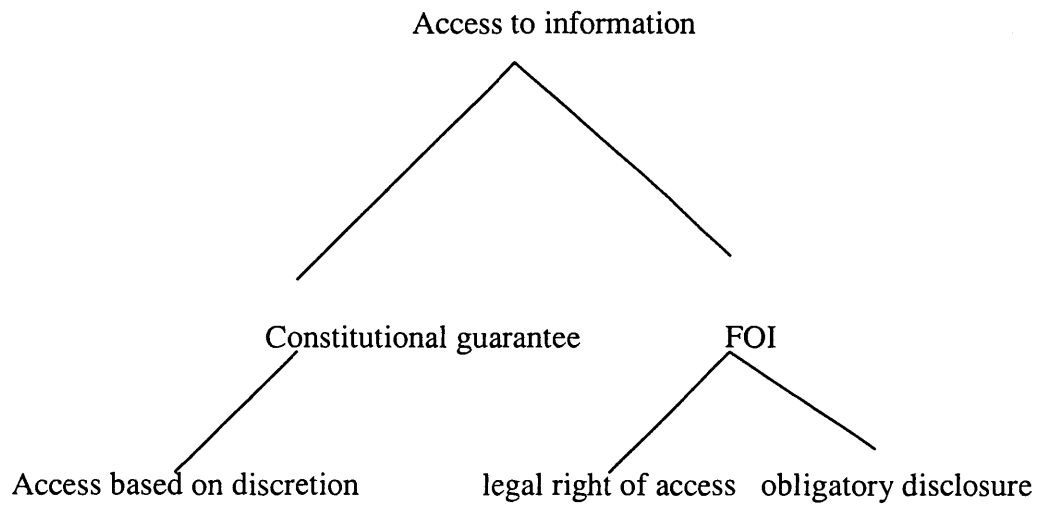
This study has as part of data analysis used N6, a version of the qualitative data analysis software named QSR NUD*IST. QSR NUD*IST which stands for Qualitative Solutions and Research Non-numerical Unstructured Data Indexing Searching and Theorising has been designed to assist qualitative based research to analyse text documents that are non-numerical and unstructured e.g. interview transcripts. Essentially, N6 has been developed to accept large amounts of qualitative data through which meaning has to be made. The software allows for descriptive analysis of data through breaking it up into thematic categories. As the analysis progresses, data is indexed and coded to develop and make meaning of the themes which have been developed or are being developed.

Structure of N6

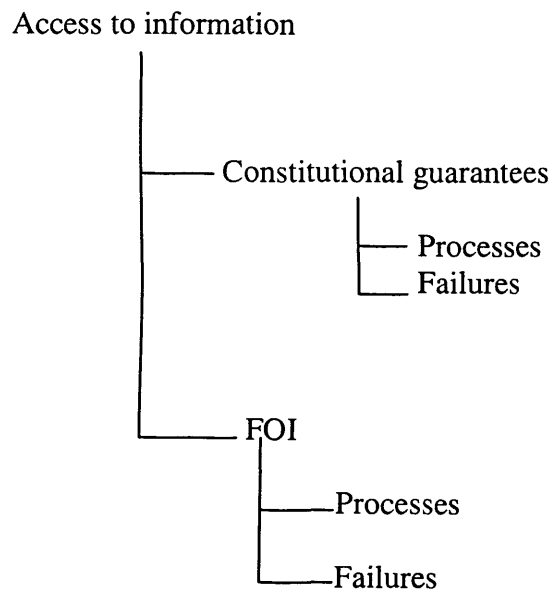
N6 is made up of two equally important components which are the document, and indexing systems. The document systems allow transcribed interviews, field notes, email communication and other textual qualitative data to be imported into the software. Through this component a researcher is able to search, retrieve, and make comparisons of the data which has been fed into the software. In this study, all the transcripts of all the interviews which had been made, the email communications, field notes and supporting data derived from literature were imported into the document system. By virtue of the system the study was able to search across whole documents or portions of them for certain thematic explorations while retaining the original structure of the transcripts and other data.

The indexing system is made up of nodes. It is through the nodes that indexing categories are arrived at having thought about the themes running throughout the data collected. The nodes can either be arranged into a tree diagram or an indented index tree. For instance:

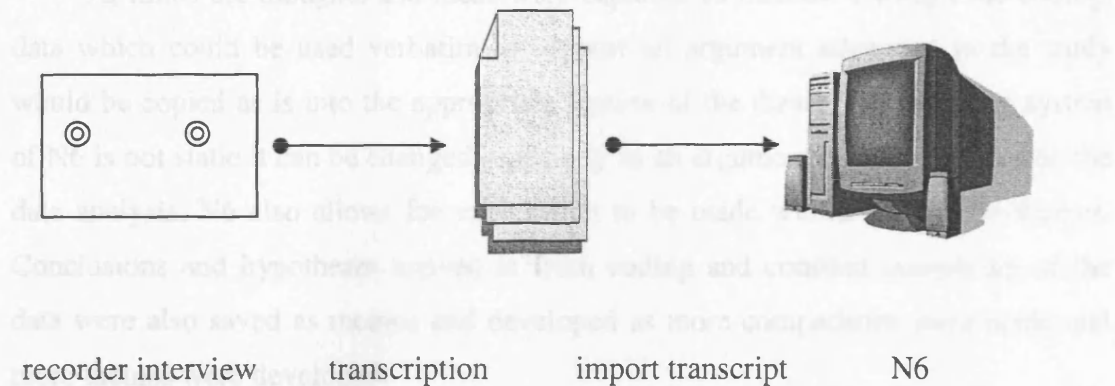
Tree diagram



Indented index tree



Process of data analysis



After the interview tape recordings were transcribed and verified through playing back the tape and comparing the audio recordings with printed version, the transcripts were then saved as txt. documents and imported to N6. Email messages, field notes, thoughts which were developed when the transcripts were read, and themes which had been developed from manual analysis of data were also saved as txt. and imported to N6.

The themes developed during manual data analysis were then used to build free nodes. N6 has two types of nodes which are the free nodes and the index nodes. Coding of the interview and other data imported into N6 were first indexed using the free nodes. Basically these were the themes onto which related sub-themes would be developed. As more ideas developed, the data was indexed at the index tree to break down the main themes into smaller ones.

During the coding process, it was possible to compare themes within an interview or across interviews from one case study country or across all of them. N6 also enabled the study to conduct text searches on certain thematic areas. For instance, if a theme was identified as 'FOI challenges' the facility enabled a search to be conducted to establish the text units which were related to the them. By reading the text units and through their constant comparisons more ideas were developed which lead to more theme and sub-themes being developed. The ability of N6 to allow to

constant comparisons to be made on the coded data led to validity about the data being developed.

At times the thoughts and ideas were captured as memos. Through the coding, data which could be used verbatim to support an argument advanced in the study would be copied as is into the appropriate section of the thesis. The indexing system of N6 is not static it can be changed especially as an argument develops alongside the data analysis. N6 also allows for exploration to be made within and across themes. Conclusions and hypotheses arrived at from coding and constant comparing of the data were also saved as memos and developed as more comparisons were made and more themes were developed.

Appendix 7 Declaration-National Security Act form



BOTSWANA GOVERNMENT

DECLARATION — NATIONAL SECURITY ACT

Form DPSM 3

General Order 110 (3), 206

Date of issue

1. Declaration

PS No.

My attention has been drawn to the provisions of the National Security Act, Chapter 23:01, which are set out below and I am fully aware of the serious consequences which may follow any breach on my part of such provisions.

I undertake not to divulge any information gained by me as a result of my employment, except in the course of duty or as may be authorised by my superior officer*. I understand that these provisions and this Declaration are binding on me not only during my employment but also after I have left the Public Service.

I further undertake on leaving the Public Service to surrender any sketch, plan, model, article, note or document made or acquired by me in the course of my official duties, save such as I have been authorised by my superior officer* to retain.

Officer's signature

Name in block letters

Grade

Date

2. Certification

The above provisions have been spelled out to the officer concerned in practical terms and I feel certain that he/she understands them and how they should be put into practice

Senior Officer's signature

Name in block letters

Grade

Date

NATIONAL SECURITY ACT, CAP 23:01

Section 4 (1) of Chapter 23:01 provides as follows—

"4. (1) Any person who, having in his possession, or control, any secret official codes, password, sketch, plan, model, note, document, article or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under the Government, or owing to his position as a person who holds or has held office under the Government, or as a person who is or was party to a contract with the Government or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed by or under a person who holds or has held such an office or is or was a party to such a contract —

- (a) uses the information in his possession for the benefit of any foreign power or in any other manner or for any purpose prejudicial to the safety or interests of Botswana; or
- (b) communicates the codes, pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate with, or to a person to whom it is in the interest of Botswana his duty to communicate it; or
- (c) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official codes, a password or information;
- (d) retains the sketch, plan, model, note, document or article in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any lawful directions issued with regard to the return or disposal thereof,

shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 30 years "

*Note: The following are superior officers for the purposes of this Declaration

The President
Ministers and Assistant Ministers
Commissioner of Police
Attorney-General
Permanent Secretaries
District Commissioners
Heads of Diplomatic Missions